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CONVEYANCER'S NOTEBOOK

RECEIPTS ON CHEQUES—STAMP DUTY

In Vol. 17, at p. 491, in his second article on the Law of Stamp Duties, Mr. J. G. Monroe said that, in view of exemption (11) under the heading "Receipt" in the First Schedule to the Stamp Act, 1891 (receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned), "it is difficult to understand why persons who like to have the receipts given to them on the back of their cheques also require them to be stamped."

A correspondent writes that he has made investigations into the question and took the matter up with the Controller of Stamps. The latter replied that a receipt for a sum of £2 or over written upon a bill of exchange (which includes a cheque) is liable to 2d. stamp duty. "Under exemption (8) . . . a receipt such as is described above was exempted from duty provided that the cheque upon which it was written was duly stamped. This exemption was, however, repealed by section 9 of the Finance Act, 1895, which directs that such receipts, with certain exceptions, shall henceforth be liable to duty 'and the duty shall be charged as if the exemption had not been contained in that schedule.' It follows that exemption (11) under the head 'Receipt' has never operated, and cannot operate to exempt from liability to duty a receipt for £2 or over written upon a cheque."

Mr. Monroe does not agree with the Controller of Stamps and does not, on balance, think his argument well founded. "Briefly,"

he says, "the Controller's contention is that a receipt on the back of a bill of exchange was expressly exempt from duty under the Stamp Act, 1891. This express exemption was repealed by the Finance Act, 1895, which further enacted that duty should be charged as if the exemption had not been contained in the Schedule. It follows, say the Revenue, that exemption (11) under the heading "Receipt" never operated to exempt from liability to duty a receipt endorsed on a cheque. This last is with all respect a *non sequitur*. It may be argued that the maxim *generalia specialibus non derogant* would prevent one now from relying on exemption (11) in the case of receipts on the backs of cheques; but it is surely absurd to say that they never were exempt under exemption (11). Obviously there are several classes of receipts that are exempt under more than one of the various exemptions and one might well ask, for instance, whether a receipt exempt under, say, exemption (12) (receipt for any allowance by way of drawback, etc.) or exemption (6) (receipt for salary or wages, etc.), is to be regarded as subjected to duty if it is endorsed on a cheque.

"The Finance Act, 1895, does not say that duty shall be charged on all receipts endorsed on bills of exchange. It says that duty shall be charged as if exemption (8) had not been contained in the Schedule to the Stamp Act, 1891. It is at least arguable that the only effect of the change is to subject to duty those receipts which were exempt under exemption (8) and not also under some other exemption."

Maintenance Orders in favour of Children

Too often the incidence of taxation is not fully considered by practitioners when the court is being asked to make a maintenance order. A due regard to the question may make the extraction of the maximum contribution from the husband, if not painless, at any rate less painful. Where an order is made against a husband to pay sums to the wife for the maintenance of the children the sums paid form part of the wife's income (*Stevens* v. *Tirard* [1940] 1 K.B. 204; *Kinnane* v. *Kinnane* [1953] 3 W.L.R. 782). The result is that the child allowance is rightly claimed by the wife and not the husband, but, on the other hand, the child has no income of its own so as to give rise to a claim for repayment of tax. In *Yates* v. *Starkey* [1951] Ch. 465 an order of the divorce court was made whereby the husband agreed to pay to the wife the annual sum of £100 less tax in trust for each of the three children. The result was disastrous, for the order constituted a settlement so that the annual sums were deemed to be the income of the husband for income tax and surtax purposes: Income Tax Act,

1952, s. 397. It was pointed out that in any event it was doubtful whether the court had jurisdiction to create a trust of annual payments in favour of the children.

If the income were to be payable direct to the infant it would constitute income of the infant and not of either parent, with the result that the infant could claim a personal allowance. Furthermore, if the total income of the child were not to exceed £85 per annum (or the appropriate amount allowed from time to time under the current Finance Act) the child allowance would not be lost. According to the current practice of the divorce court, there is no objection to an order being made in this way, and it is understood that where there is no reference to a trust the Inland Revenue do not regard section 397 of the Income Tax Act, 1952, as being in any way applicable. Neither does there appear to be any room for the operation of the decision in *Stevens* v. *Tirard*, *supra*, since the vital feature of that case was the form of the order directing payment to the wife. In these circumstances the payments are regarded by the Inland Revenue as the income for tax purposes of the child, and a claim for repayment of tax, according to the child's circumstances, will, in appropriate cases, be admisssible if made on his behalf. The liability to income tax or surtax of the mother, and, if she re-marries, her second husband, will not be affected by the existence of the order except insofar as any claim by either for the child allowance is precluded on the ground that the child's income, whether under the order or otherwise, exceeds the limit of income at which such a claim becomes inadmissible.

Where the order is for direct payment to the child the maintenance will in fact be paid to the wife as the guardian of the child.

When seeking an order for the maintenance of an infant, sometimes the practitioner will have to consider whether there is any advantage or disadvantage between the divorce court and the magistrates' court. In the case of parties of small means deduction of tax at source may prove a great hardship to the wife. Small maintenance payments are payable gross instead of under deduction of tax, but, for no intelligible reason, " small maintenance payments " in the magistrates' court means weekly payments not exceeding £5 a week for the wife or £1 10s. a week for a child under 21 years of age, whereas in the divorce court the expression means £2 a week for the wife or £1 a week for a child under 16. On the other hand, there would seem to be no power for a magistrates' court to make an order in favour of a child direct : see *Kinnane* v. *Kinnane*, *supra*.

There is one other point on these orders to be noted : if the

husband defaults and the order is made direct in favour of the child, the order cannot be enforced by judgment summons until a next friend is appointed: *Shelley* v. *Shelley* (No. 1) [1952] P. 107; *Shelley* v. *Shelley* (No. 2) [1952] P. 111.

Registered Land—New Forms

The Chief Land Registrar announces the introduction of two new forms of application for first registration on behalf of a company or corporation not on a recent purchase, with statutory declaration in support. They are 1 C (Co.) for freehold land and 2 C (Co.) for leasehold land. They may be purchased through the Stationery Office or from any bookseller.

Voluntary Conveyances—Certificate of Value

In the Law Society of Scotland Newsletter (1954) S.L.T. (News) 31, there is a note with regard to certificates of value on voluntary conveyances which, when translated into English, is to the following effect:

Where the stamp duty requires to be adjudicated, difficulty is sometimes experienced where the value of the property is not known accurately when the conveyance is executed. It is understood that the Inland Revenue will, in such circumstances, accept a certificate in the following terms: "And I certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions." The appropriate scale of duty will then be applied on adjudication when the value of the property has been ascertained.

The Controller of Stamps confirms that this ruling applies equally to England and Wales.

Wife "Competent to dispose"

Arising out of Mr. D. C. Potter's article "Provision for the Widow," *ante*, p. 7, a correspondent raises a point on the difficulties arising where a husband bequeaths to his wife the income of his residuary estate for life and provides that if the income does not amount to £x the trustees shall at the widow's request make up that annual sum out of capital. At p. 12 Mr. Potter expressed the view that such a provision would make the widow "competent to dispose" whether she exercised the right or not. The correspondent asks whether Mr. Potter intended to imply that estate duty would in such a case be payable on the widow's death on the whole trust fund. He points out that it may well be that the income

never falls below £x, in which event the power given to the trustees never becomes exercisable; and even if it does fall below £x it may only fall below by a small amount.

Mr. Potter says: "I did not mean to say that the whole trust fund would be liable to estate duty on the widow's death, but only the property representing the difference between what was paid to the widow and what might have been paid under the provision for payment. The widow would be competent to dispose of such sums as represented the deficiency of income in any year. The remarks on p. 12, *ante*, should be read in conjunction with the two sentences halfway down p. 8 dealing with the draft will. Admittedly the exact liability is not set out *tot verbis*, but the article was deliberately written with a view to showing where the ice was dangerously thin, not to gauging its exact thickness. In an extreme case the liability to estate duty would be very great, but it would of course depend on the length of life of the widow and the disparity between the income produced by the fund and the 'guaranteed' income."

Gifts Inter Vivos—Estate Duty

In July, 1953, the Board of Inland Revenue issued a statement ([1953] 7 C.L. 128a; *Law Society's Gazette*, 1953, 346) that they were advised that where there was a gift *inter vivos* attracting estate duty the duty was payable, not necessarily on the property originally given, but on the property in the hands of the donee at the date of death representing the original property. This statement was amplified by a further statement (*Law Society's Gazette*, 1954, 6) from which it appeared that the Inland Revenue took the view that the charge for duty attached in like manner to the property from time to time representing that originally given. Whatever doubts there may have been on the legal position before the House of Lords decision in *Sneddon* v. *Lord Advocate* [1954] 2 W.L.R. 211 (noted *post*, p. 204), it is difficult to understand how the original statements came to be made, for they were clearly in conflict with decided cases such as *Strathcona* v. *C.I.R.* [1929] S.C. 800, unless the practice adopted was purely for the convenience of collecting revenue. The position before *Sneddon* v. *Lord Advocate* is, however, of purely academic interest, as the House of Lords there made it clear that it is the actual property given that attracts duty whether the donee retains that property at the date of the donor's death or not, and a further statement has been issued by the Board of Inland Revenue confirming that the practice laid down in the earlier statements will no longer be followed.

The statement says that in future the estate duty in respect of property taken under a disposition purporting to operate as a gift *inter vivos* will be regarded as imposed upon the property originally given, whether absolutely or not, or by way of settlement, and the word " property " will not be given the extended meaning assigned to it by the Finance Act, 1894, s. 22 (1) (f).

No doubt mere minor changes in the form of the property, as, for example, the splitting of £1 shares into two shares of 10s. each, will not affect the liability to duty, but, unless the law is changed, it would appear that, if shares in a company are given to a donee and the company is then wound up, the donee is not liable to any estate duty, however soon after the gift the donor dies.

THE LAW OF STAMP DUTIES

By J. G. Monroe, Barrister-at-Law

(*Continued*)

VII Settlements

General

Stamp duty is levied on settlements of money, stock (*h*) or securities (marketable or not marketable) at the rate of 5s. for every £100 of the amount or value of the property settled or agreed to be settled. This rate of duty is that fixed by the Stamp Act, 1891 (*l*), which has not since been altered. As will be seen the importance of settlement duty has been greatly diminished by the introduction of duty on voluntary conveyances. The First Schedule to the Act itself enlarges on the term " Settlement " by adding that " any instrument, whether voluntary or upon any good or valuable consideration, other than a bona fide pecuniary consideration whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments, or heritable subjects, or not, or to be laid out in the purchase of lands or other heritable subjects or not) or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever " is liable to the duty. There is no further definition of the word " settlement " (or " settled ") but it is thought that it bears its traditional meaning of an instrument under which property is limited to persons in succession. At any rate neither a mere declaration of trust (*m*) nor a conveyance of property subject to payment of an annuity (*n*) is a settlement. Indeed all the cases that have come before the courts in which settlement duty has been held to be exigible have been cases of limitations to persons in succession, though they have included as well as an ordinary settlement (*o*), instruments as diverse as a resettlement (*p*), an order of the court (*q*), and an

(*h*) The definition of Stock (and marketable security) will be considered in a later article.

(*l*) 54 & 55 Vict. c. 39, Sched. I: Settlement.

(*m*) As this is specifically charged with a fiscal duty of 10s. Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Declaration of Trust.

(*n*) *I. R. C.* v. *Oliver* [1909] A.C. 427.

(*o*) *Ansell* v. *I. R. C.* [1929] 1 K.B. 608.

(*p*) *Northumberland* (*Duke*) v. *I. R. C.* [1911] 2 K.B. 343; rev. on another point: *ibid.*, 1011.

(*q*) *Re Gowan* (1880) 17 Ch.D. 778.

appointment of trustees with the settled property scheduled to it (*r*). Liability to duty in this last case arose where property had been transferred to the trustees of a subsisting settlement without the need for payment of duty and thereafter (in the opinion of the judge as part of the same transaction) the appointment of new trustees was made with the added property scheduled thereto. It follows from this that a memorandum endorsed on a settlement of any dutiable property brought into settlement will (if it is not exempt (*s*)) be liable to settlement duty. It should not, however, be supposed that every appointment of new trustees to which the settled property is scheduled (even if it has borne no duty before) will be liable to settlement duty. It is only if it is one transaction with the settling of the property that it bears duty. Thus an appointment of new trustees of a settlement which was originally a settlement of land is not liable to duty even if the settled property has been converted into money, stock or securities (*t*). By specific statutory provision the trust deed of a unit trust scheme is subject to settlement duty (*u*).

Settlement is one of the instruments in the table in section 15 (2) of the Stamp Act, 1891 (*x*), under which a penalty of the amount of the duty is payable on stamping more than thirty days after execution, and the settlor is liable to a fine of £10 for failure to stamp.

The property

By the terms of the charge to duty it is levied only on settlements of (i) definite and certain principal sums of money, (ii) definite and certain amounts of stock (*a*), and (iii) securities whether marketable or not. There is thus a wide range of property not subject to the duty at all of which the most important is land. Land or other property held on trust for sale is not by reason of the equitable doctrine of conversion liable to the duty as the proceeds would not be a definite and certain sum of money (*b*). It is thought that if the settlement contains a covenant to settle after-acquired property to which the settlor is entitled in expectancy

(*r*) *Cohen and Moore* v. *I. R. C.* [1933] 2 K.B. 126.

(*s*) *e.g.*, because voluntary conveyance duty has been paid: Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (4).

(*t*) *Masserene* v. *I. R. C.* [1900] 2 Ir.R. 138, approved in *Cohen and Moore* v. *I. R. C.* [1933] 2 K.B. 126.

(*u*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 53. "Unit Trust Scheme" is defined in s. 57.

(*x*) 54 & 55 Vict. c. 39.

(*a*) The definition of stock, together with the definition of marketable security, will be considered in a later article.

(*b*) *Re Stucley's Settlement* (1870) L.R. 5 Ex. 85.

that property (if of a dutiable class) will be included in that charged, but not property which the settlor has a lively hope of inheriting but in which he has no previous interest. Settlement duty when charged on a trust deed of a unit trust scheme is charged on property of all kinds, and whether the amount or value is definite and certain or not (*c*).

On the authority of the case of *Onslow* v. *I. R. C.* (*d*) the duty is charged, even when the interest settled is not an interest in possession or is contingent, on the value of the property in which the interest subsists as if it were an absolute interest in possession. Thus, if a settlor, being entitled in default of appointment to the contrary to one-fourth of a fund of securities contingently on his surviving a life tenant, settles that interest, settlement duty is charged on one quarter of the value of the fund. The Stamp Act, 1891 (*e*), contains special provisions for the case where a policy of life insurance is settled. Duty is paid in respect of such policies when settled on the amount secured by the policy (which includes bonuses declared down to the date of the settlement) except that, if no provision is made for keeping up the policy either in the settlement or independently of it (*f*), duty is charged only on the value of the policy at the time of the settlement. For this purpose if the settlement recites the value of the policy and is stamped accordingly it is to be deemed to be properly stamped until the statement is proved untrue.

Exemptions

(i) The heading "Settlement" in the First Schedule to the Stamp Act, 1891, contains an exemption in favour of an instrument of appointment in favour of persons specially named or described as the objects of a power of appointment where duty has been paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power. This exemption will cover most appointments made in exercise of a special power of appointment, whether the power was conferred by settlement or will or codicil. Duty on grants of representation has now been abolished (*g*), but no claim is made for settlement duty on an

(*c*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 53 (1).

(*d*) [1891] 1 Q.B. 239. It is said to be an inference from ss. 104 and 105 of the Stamp Act, 1891 (54 & 55 Vict. c. 39). The inference is not very obvious.

(*e*) 54 & 55 Vict. c. 39, s. 104. This section refers also to settlements of securities other than marketable securities. The duty in such cases is payable on the amount secured and not the value of the security.

(*f*) *Northumberland (Duke)* v. *I. R. C.* [1911] 2 K.B. 1011.

(*g*) Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 35, and Sched. VIII, para. 12.

appointment of successive interests in money, stocks or securities in exercise of a special power of appointment conferred by will.

An appointment in exercise of a general power of appointment is not within the exemption, and an appointment otherwise than by will of successive interests in money, stocks or securities in exercise of such a power would be liable to settlement duty, unless (as seems most probable (*h*)) it would be liable to duty as a voluntary conveyance, when it would fall under a different exemption (*k*).

The exemption only applies to an instrument to which the donee of the power is a party. It does not extend to an instrument executed by some other person to give effect to the donee's exercise of the power (*l*).

(ii) Section 105 of the Stamp Act, 1891 (*m*), confers an exemption not from settlement duty but from other duty which might otherwise be exigible in addition to settlement duty. It has already been stated that where an interest in reversion is settled settlement duty is payable on the value of the property as if the interest were in possession. It is accordingly provided that, if the settlement contains provision for the payment of the income of the property pending its vesting in possession by the person entitled in possession, or for the payment of the equivalent of not more than 4 per cent. per annum on the value of the property, it shall not attract any further duty. It is not stated to whom the payment is to be made for the exemption to apply. It is assumed, however, that it is intended to cover provision for such payment's being made to the trustees of the settlement. Apart from this provision Bond Covenant duty would be payable, as it is in fact payable where the interest is not in reversion but in possession at the date of the settlement (*n*).

(iii) Section 106 of the Stamp Act, 1891 (*o*), contains provisions intended to avoid the payment of *ad valorem* duty on more than one of the several instruments that are, or may be, required to effect a settlement (*p*), or where an agreement for a settlement is followed by the actual settlement (*q*). The instrument which does not bear the *ad valorem* duty is charged with a duty of 10s. The

(*h*) See *Stanyforth* v. *I. R. C.* [1930] A.C. 339; *Fuller* v. *I. R. C.* [1950] 2 All E.R. 976.
(*k*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (4).
(*l*) *Russell* v. *I. R. C.* [1902] 1 K.B. 142.
(*m*) 54 & 55 Vict. c. 39.
(*n*) *Underground Electric Ry. and Glyn, Mills, Currie & Co.* v. *I. R. C.* [1914] 3 K.B. 210, at p. 220; on appeal [1916] 1 K.B. 306.
(*o*) 54 & 55 Vict. c. 39.
(*p*) *Ibid.*, s. 106 (1).
(*q*) *Ibid.*, s. 106 (2).

exemptions in this section do not extend to a series of instruments dealing with settled property in different ways (*r*), nor, it is thought, to a separate instrument dealing with separate items of property (*s*).

(iv) It may be said that the fourth exemption is so illusory that it is misleading to treat it as an exemption at all. Section 74 of the Finance (1909–10) Act, 1910 (*t*), imposed stamp duty for the first time on all conveyances and transfers operating as a voluntary disposition, *inter vivos*, and subsection (4) of that section provides that an instrument chargeable with duty as a voluntary conveyance and under the heading " Settlement " shall be charged with duty as a voluntary conveyance and not as a settlement. As the rate of duty on a voluntary conveyance was originally four times and is now (*u*) eight times the rate of duty on a settlement the exemption would appear somewhat disappointing. But it should be appreciated that it does counteract the normal rule of stamp duty that where one of two alternative duties could be levied the Revenue may take the larger (*v*). As settlement duty is levied on the value of the property in which the interest settled subsists whilst voluntary conveyance duty is levied on the value of the interest conveyed or transferred it is still possible in exceptional cases for settlement duty to work out the higher. Then the exemption is effective, as with settlements of contingent and reversionary interests, settlements with a power of revocation (*w*), and settlements of life assurance policies where there is provision under or outside the settlement for keeping up the policy. Where a settlement includes both property on which voluntary conveyance duty is payable, and property exempt from voluntary conveyance duty (such as government securities), the two are treated as separate and distinct matters under section 4 of the Stamp Act, 1891 (*a*), so that voluntary conveyance duty is paid on the property subject thereto and settlement duty is paid on the remainder of the property (*b*). The exemption extends only to the property liable to voluntary conveyance duty.

Present importance of settlement duty

This fourth exemption has deprived settlement duty of a great deal of its importance. In practice settlement duty is now mainly

(*r*) *Russell* v. *I. R. C.* [1902] 1 K.B. 142, at p. 152.
(*s*) *Cf. Ansell* v. *I. R. C.* [1929] 1 K.B. 608.
(*t*) 10 Edw. 7, c. 8.
(*u*) As a result of Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.
(*v*) See Vol. 17, p. 392.
(*w*) See *Stanyforth* v. *I. R. C.* [1903] A.C. 339, discussed in connection with voluntary dispositions, p. 118, *post*.
(*a*) 54 & 55 Vict. c. 39.
(*b*) *Ansell* v. *I. R. C.* [1929] 1 K.B. 608.

levied (i) on marriage settlements, (ii) on government securities and other securities exempt from duty on the conveyance or transfer thereof (*c*), (iii) on securities purchased by the settlor and vested by the vendor on the settlor's direction in the trustees of the settlement, and (iv) on property such as cash or renounced shares (particularly bonus shares) which can be vested in the trustees of a settlement without any instrument of transfer liable to voluntary conveyance duty. In all these cases settlement duty is commonly saved by referring only to a small part of the property settled in the settlement and supplementing it thereafter. Any memorandum accompanying such supplementation is, of course, liable to duty (*d*). In cases (iii) and (iv) above care must be taken to ensure that the transaction is not carried out in such a way as to attract voluntary conveyance duty. If the property to be settled is vested in the trustees after the settlement has been executed no question can arise. But if the property is vested in the trustees before the settlement is executed there may (even only momentarily) be a resulting trust for the settlor (*e*). If there is, the execution of this settlement will itself be a voluntary conveyance and attract duty as such (*f*). It is possible that there is no resulting trust for the settlor and that the property is held by the trustees from the outset on the trusts to be declared in the settlement (*g*), but it will be difficult to establish this if the settlement has not been drafted at the time of the vesting in the trustees. It is prudent to avoid all question by executing the settlement first.

VIII. Voluntary Dispositions

General

The Stamp Act, 1891 (*h*), does not impose any *ad valorem* duty on voluntary dispositions as such. But *ad valorem* duty was imposed on them for the first time by the Finance (1909–10) Act, 1910 (*l*), and it has been suggested (*m*) that it was introduced in order to compensate the Revenue for the loss of estate duties sustained when gifts are made and the donor survives for the statutory period (now five years (*n*)) thereafter. The duty is imposed on any conveyance or transfer operating as a voluntary disposition

(*c*) See p. 119, *post*.
(*d*) *Cf. Cohen and Moore* v. *I. R. C.* [1933] 2 K.B. 126.
(*e*) As in *Martin* v. *I. R. C.* (1930) 15 A.T.C. 631; *Re Robb's Contract* [1941] Ch. 463.
(*f*) *Martin* v. *I. R. C.* (1930) 15 A.T.C. 631.
(*g*) *Cf. Brennan Minor's Trustees* v. *Scanlan* (1925) 41 T.L.R. 452.
(*h*) 54 & 55 Vict. c. 39.
(*l*) 10 Edw. 7, c. 8.
(*m*) *Anderson* v. *I. R. C.* [1939] 1 K.B. 341, at p. 345, *per* Macnaghten J.
(*n*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 47, and Sched. XI.

inter vivos, and any such conveyance or transfer is to be charged with duty as if it were a conveyance on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. It is thus necessary in order to assess the duty to imagine a hypothetical sale and all the provisions as to duty on conveyance on sale are imported into it.

Accordingly duty is levied at £2 per £100 (*o*) on the value of the property transferred, reduced rates being applicable (except in the case of stock and marketable securities (*p*)) as follows:

Where the value of the property does not exceed £500 and the conveyance contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the value, or the aggregate value of the property transferred exceeds £500 (*q*), the rate is 10s. per £100;

where the value of the property (whether more or less than £500) does not exceed £3,000 and a similar certificate in a sum of £3,000 is included, the rate is £1 per £100;

and where the value of the property (whether more or less than £3,000) does not exceed £3,450 and a similar certificate in a sum of £3,450 is included, the rate is £1 10s. per £100 (*r*). In practice, where there is any doubt about the value of the property, the Revenue will accept a certificate that the transaction does not form part of a larger transaction or a series of transactions. The appropriate scale of duty will then be applied on adjudication when the value of the property has been ascertained (*rr*). Until the passing of the Finance Act, 1947 (*s*), the rate was £1 per £100 and the only reduced rate was that where the value was below £500 and the appropriate certificate was given. The increases effected by the 1947 Act do not apply to any conveyance to a body of persons established for charitable purposes only, or to the trustees of a trust so established (*t*). Accordingly, in case of such conveyances the rate never exceeds £1 per £100 and no certificate of value is required unless the 10s. rate is applicable.

(*o*) Reference should be made to a table of duties for full details of the steps by which the duty increases.

(*p*) The definition of these terms will be considered in a later article.

(*q*) See Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 73. The form of certificate in case of voluntary dispositions may be deduced by inference from Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73 (3).

(*r*) See Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73.

(*rr*) See [1954] 3 C.L. 421.

(*s*) 10 & 11 Geo. 6, c. 35. The reduced rates now in force are not actually those introduced in 1947.

(*t*) *Ibid.*, s. 54 (1).

The circumstances in which a certificate may properly be given are much the same as those applicable to a conveyance on sale, though in a case of bounty the idea of a larger transaction or a series of transactions is less familiar than in commercial transactions. It is submitted, however, that the certificate may be given where a father makes two or more separate but simultaneous gifts worth, say £3,000 each, one to each of his children. It should be noted, however, that the statutory provision which permits simultaneous sales of goods, wares or merchandise to be disregarded does not permit simultaneous gifts of goods, wares or merchandise to be disregarded (*u*).

A voluntary disposition is included by reference in the table in section 15 of the Stamp Act, 1891 (*a*), under which a penalty equal to the amount of the duty may be exacted for stamping out of time and a fine of £10 is imposed on the disponor for failure to stamp in accordance with the section (*b*).

Instruments subject to the duty

The charge to duty is imposed on any conveyance or transfer operating as a voluntary disposition *inter vivos*. In order to fall within the charge to duty an instrument must (i) be a conveyance or transfer, and (ii) operate as a voluntary disposition *inter vivos*.

Conveyance or transfer

The expression "conveyance or transfer" is widely defined in section 62 of the Stamp Act, 1891 (*c*), and it has been held that a voluntary declaration of trust (*d*), and an appointment under a general power of appointment (*e*) are chargeable with duty under this head. It would seem that an appointment under a special power is as much a conveyance or transfer as an appointment under a general power (*f*), and such an appointment escapes liability when (as is usually the case) it does not operate as a voluntary disposition *inter vivos* (*g*). Again the release of a life interest so as to accelerate the remainder is a conveyance (*h*), and it is highly probable that the release of any equitable beneficial interest, whether in favour of some other beneficiary or in

(*u*) Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 36.
(*a*) 54 & 55 Vict. c. 39.
(*b*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (3).
(*c*) 54 & 55 Vict. c. 39.
(*d*) *Martin* v. *I. R. C.* (1930) 15 A.T.C. 631.
(*e*) *Fuller* v. *I. R. C.* [1950] 2 All E.R. 976. *Cf. Stanyforth* v. *I. R. C.* [1930] A.C. 339.
(*f*) See *Kemp* v. *I. R. C.* [1905] 1 K.B. 581, *per* Phillimore J., at p. 587.
(*g*) *Cf.* case cited in note (*m*), *infra*.
(*h*) *Platt's Trustees* v. *I. R. C.* (1953) 32 A.T.C. 292.

favour of the owner of the legal interest, would be regarded as a conveyance. It is also settled that voluntary settlements of all sorts are within the charge to duty, and it is not necessary that all the beneficiaries (or transferees) should be in existence or ascertained at the date of the settlement (*j*).

Voluntary disposition inter vivos

The expression "operating as a voluntary disposition *inter vivos*" is defined in section 74 (5) of the Finance (1909–10) Act, 1910 (*k*), which provides (i) that any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and (ii) that (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances, the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred. If part (i) of the foregoing definition stood alone there would be an obvious means of avoiding duty on gifts by providing for an inadequate consideration; and it is obvious that such sales are brought within the definition; but in other respects the definition might be clearer than it is. For instance, apart from the section one could state with some certainty that a transfer from A to B made in pursuance of an obligation to C (*l*), or a transfer by trustees in exercise of a fiduciary power to take property out of settlement and give it to some beneficiary or other person (*m*), are not voluntary. But in view of part (ii) of the definition it is impossible to say with certainly that all such transfers do not by reason of the inadequacy of the sum paid as consideration or otherwise confer a substantial benefit on the transferee. The whole question depends on the meaning of the words "or otherwise" and on them there is no authority. The only obvious case

(*j*) *Baker* v. *I. R. C.* [1924] A.C. 270.

(*k*) 10 Edw. 7, c. 8.

(*l*) See *Re D'Avigdor-Goldsmid* [1951] Ch. 1038, at p. 1055, *per* Evershed M.R.; on appeal, *sub nom. D'Avigdor-Goldsmid* v. *I. R. C.* [1953] A.C. 347; *Re Fitzwilliam* [1950] Ch. 448, at p. 456, *per* Danckwerts J.

(*m*) See *Cunard* v. *I. R. C.* [1946] 1 All E.R. 159, at p. 163, *per* Lord Greene M.R. This case will normally fall within the exemption in Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (6). It has been suggested, however, that an assent or conveyance by a personal representative or trustee to a donee from a beneficiary may be chargeable under this head if the donation was not effected by an instrument: see Vol. 17, pp. 376–7.

in which the section applies is the case of an inadequate consideration in cash or in kind. In such cases it should be noticed that the duty is levied on the full value of the property transferred and not merely on the benefit. Thus, if A transfers Blackacre to B in exchange for Whiteacre and Blackacre is worth £2,000 and Whiteacre is worth £1,000, a substantial benefit of £1,000 is conferred on B and duty would be payable on £2,000. It would thus be cheaper for A to transfer half Blackacre in exchange for Whiteacre and thereafter to make a gift of the other half which gift would attract duty on £1,000. The decision whether a substantial benefit is conferred is with the Commissioners though in some circumstances it may be possible to go behind it (*n*). It has been said that a substantial benefit means a substantial benefit over and above what is paid for (*o*); it is suggested that it is also over and above what services or other considerations are given, since where full consideration is given there is no benefit (*p*). It is clear, however, that a transfer is not the less voluntary because the transferor has previously entered into a voluntary binding obligation to make it. Thus satisfaction of a dividend (*q*) or a reduction of capital (*r*) by transfer of assets *in specie* is liable to duty under the present head.

The computation of the duty

The duty is levied on the value of the interest transferred and unless the transaction is an out and out transfer of stock exchange securities there is always room for differences of opinion on the amount of the duty, and it is accordingly enacted that the proper duty be adjudicated, and that the instrument shall not be deemed to be properly stamped unless it is (*s*). It is certainly not customary, and it is probably impracticable, to comply with the statutory requirement (*t*) of including all facts and circumstances affecting the duty in the instrument. It is more usual to let the Commissioners demand, as they are entitled (*u*), such information as they require for the purpose. They can refuse to stamp the

(*n*) See *Baker* v. *I. R. C.* [1924] A.C. 270.

(*o*) *Wigan Coal & Iron Co.* v. *I. R. C.* [1945] 1 All E.R. 392, at p. 395, *per* Wrottesley J.

(*p*) *Cf. Att.-Gen.* v. *Seccombe* [1911] 2 K.B. 688, at p. 704; *Oakes* v. *Commissioner of Stamp Duties of N.S.W.* [1953] 3 W.L.R. 1127.

(*q*) *Associated British Engineering* v. *I. R. C.* [1941] 1 K.B. 15.

(*r*) *Wigan Coal & Iron Co.* v. *I. R. C.* [1945] 1 All E.R. 392.

(*s*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (2). The Revenue permit the registrars of companies to register transfers of quoted shares and debentures stamped in accordance with the market value without adjudication.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5.

(*u*) *Ibid.*, s. 12 (2).

instrument until the information is given (*a*), and in their capacity of collectors of income tax and estate duty can refuse to give effect to the instrument until it is stamped.

In general the duty on a transfer under this head will be very much the same as it would be upon a conveyance of property at a bona fide consideration, the consideration being very similar to the value. But there are a few cases of difference. Thus, as has been seen in an earlier article, a duty is payable under this head on the voluntary transfer of a mortgage (*b*), whereas on a transfer of a mortgage for adequate consideration duty is levied at the rate of 1s. per £100 on the amount secured, being the rate appropriate to a transfer of a mortgage (*c*). This is an example of the duty on the voluntary conveyance being higher. On the other hand, where property subject to a mortgage is transferred it is thought that duty can be exacted either on the amount of the mortgage as a conveyance on sale (*d*), or on the value of the equity of redemption as a voluntary conveyance thereof, the Revenue being entitled to claim whichever of these is the larger. At any rate the Revenue claims only this, and not both duties, as they could if the equity of redemption were sold for a sum equal to its value. Again, it is suggested that section 60 of the Stamp Act, 1891 (*e*), which deals with the sale of annuities and other rights not previously in existence, has no application by reference to voluntary dispositions. Thus, for instance, it is thought that a voluntary covenant to pay an annuity is liable only to Bond Covenant duty (*f*), and not to *ad valorem* duty on the value of the annuity as a voluntary disposition *inter vivos*.

So far the question of the computation of duty has been considered on the assumption that the transfer involves the whole interest in the property transferred. But, of course, it may be only a limited interest that is transferred, as, for instance, a life interest or an interest liable to be defeated on a contingency. In assessing the value of the property due weight has to be given to the contingency, the duty of the computer being to postulate a hypothetical sale and determine what the hypothetical purchaser would pay for the interest received (*g*). Credit is thus to be given

(*a*) *R.* v. *I. R. C., ex p. Evill* [1951] 2 T.L.R. 857.
(*b*) *Ante*, p. 37; *Anderson* v. *I. R. C.* [1939] 1 K.B. 341.
(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Mortgage, Bond, Debenture, Covenant, No. (4).
(*d*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 57. It has been suggested that the duty is limited to an amount assessed on the value of the property unencumbered: *Huntingdon* v. *I. R. C.* [1896] 1 Q.B. 422 at p. 428.
(*e*) 54 & 55 Vict. c. 39.
(*f*) Under Sched. I: Bond, Covenant, etc., No. (1).
(*g*) See *Stanyforth* v. *I. R. C.* [1930] A.C. 339, *per* Lord Warrington of Clyffe, at p. 344.

for any interest in the property possessed by the donee before the disposition or for any interest retained by the donor thereafter. The same is the case where the settlor carves an interest out of his own property or property over which he has a general power of appointment, and then reserves some power of revocation which has the effect of whittling down the value of what is settled possibly to an insignificant amount (*h*). It has accordingly been suggested that a good way of avoiding stamp duty on a voluntary settlement is to reserve a power of revocation which can subsequently be released. There would appear, however, to be three ways in which this scheme is open to attack in all cases where the power of revocation is not genuinely wanted, and it is not recommended. First, it may be argued that the only relevant decision (*k*), being a decision on the effect of an overriding power of revocation on the exercise of a power of declaring new trusts under a subsisting settlement, has no bearing on the ordinary case of a gift or settlement with a power of revocation exercisable by the donor. This argument seems difficult to sustain. Next the Revenue may take the view that the power of revocation is not intended to be exercised and allow only a token reduction in the valuation on its account (*l*). In order to escape this danger it is necessary at least to postpone the release until after the adjudication. Meanwhile the gift will probably not be achieving the effect of saving income tax and surtax (*m*), or of starting the five-year period running for estate duty, and the saving of stamp duty will prove dearly bought if the settlor dies on the fifth anniversary of a day between the date of the settlement and the release (*n*). The third possible line of attack on the transaction would be to assess the release of the power itself as a voluntary disposition. It has been suggested already that, as the release of a life interest so as to accelerate the remainder is liable to duty under this head (*o*), so other releases which have the effect of extinguishing an equitable interest in favour of persons entitled either to other equitable interests or to the legal interest may be similarly liable.

(*h*) As in *Stanyforth* v. *I. R. C.* [1930] A.C. 339.

(*k*) *Stanyforth* v. *I. R. C.* [1930] A.C. 339.

(*l*) This possibility is suggested in *Stanyforth* v. *I. R. C.* [1930] A.C. 339, *per* Lord Warrington of Clyffe, at pp. 344–5.

(*m*) See Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10), s. 404.

(*n*) A literal interpretation of Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (c), incorporated into the law of estate duty by Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c), would suggest that estate duty is payable even if this power of revocation is extinguished more than five years before the death: Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (3), does not assist.

(*o*) *Platt's Trustees* v. *I. R. C.* (1953) 32 A.T.C. 292.

Exemptions and reduced rates

It has already been mentioned that all the exemptions and reduced rates applicable to a conveyance on sale are equally applicable to a conveyance operating as a voluntary disposition *inter vivos* (*p*). Thus, for instance, government securities (*q*) and, it is thought, conveyances between certain associated companies (*r*) are exempt from duty, and conveyances of property other than stock and marketable securities of a value less than £3,450 (*s*), and conveyances to charities may pay a lower rate of duty (*t*). The proviso to section 74 (1) of the Finance (1909–10) Act, 1910 (*u*), expressly exempts conveyances of land to a non-profit-making body incorporated by Act of Parliament for the purposes of an open space. Section 74 (6) exempts transfers for a nominal consideration for the purpose of securing the repayment of an advance or loan; for effectuating the appointment of a new trustee or the retirement of a trustee; under which no beneficial interest passes; made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust; or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property. It might well be suggested that this last exemption is not really necessary and was included *ex abundanti cautela*. It was held, however, under this subsection as originally enacted that instruments of the kind described required an adjudication stamp (*v*), but it has now been amended with retrospective effect (*w*) and no adjudication stamp is required. It has been suggested that a transfer of property from trustees of a trust to other trustees of a different trust, but with an identical beneficial interest, would be liable to *ad valorem* stamp duty under this head, presumably on the value of the trust property (*x*). It is submitted, however, that the present exemption would apply.

IX Commercial Contracts

General

It might perhaps be expected that commercial contracts should not be subject to stamp duties on the ground that it is unwise to

(*p*) See generally, Vol. 17, p. 500o, and p. 113, *ante*.
(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: General Exemption, No. (1).
(*r*) Under Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 42.
(*s*) Under Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 73, and Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73.
(*t*) Under Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (1).
(*u*) 10 Edw. 7, c. 8.
(*v*) *Re Robb's Contract* [1941] 1 Ch. 463.
(*w*) Finance Act, 1942 (5 & 6 Geo. 6, c. 21), s. 44.
(*x*) See *Re Brockbank* [1948] Ch. 206, at p. 209.

interfere with commerce by imposing irksome and possibly unremunerative duties. Indeed there has perhaps been a judicial tendency to restrict the imposition of some duties to non-commercial documents (*y*). Moreover, perhaps the most important commercial contract of all, the sale of goods for a single sum, has always been exempt from stamp duty when the agreement is executed under hand only (*z*). Other commercial documents, such as charterparties and letters of allotment and proxies for a single meeting were exempted by the Finance Act, 1949 (*a*), in the process of a general repeal of unproductive duties. At the other end of the scale there are a number of commercial contracts which are specifically subjected to *ad valorem* duties with ancillary provisions imposing sometimes penalties, sometimes an obligation to stamp before execution, sometimes an obligation to reduce the contract to writing, which would appear inconsistent with a policy of freeing commercial contracts from stamp duties. There appears no guiding principle. Among such contracts are bearer documents showing the title to share or loan capital of corporations, which will be dealt with separately, and bank notes, bills of exchange, promissory notes, policies of insurance and contract notes which will be considered at once.

Bank notes

The First Schedule to the Stamp Act, 1891 (*b*), provides for a scale of duties on bank notes ranging from 5d. for a bank note not exceeding £1 to 8s. 6d. for a bank note for more than £50 but not more than £100. By definition for the purposes of the Act a bank note, unless issued by the Bank of England, is limited to £100 (*c*). The Bank of England is exempt from duty on its notes (*d*). In fact only those banking institutions that were licensed to issue bank notes before the coming into force of the Bank Charter Act, 1844 (*d*) may issue bank notes. There are no such institutions remaining in England or Wales and it is only in Scotland that any question can now arise. It appears from section 30 of the Stamp Act, 1891 (*dd*) that it is possible to obtain

(*y*) See, *e.g.*, *North of Scotland Bank* v. *I. R. C.*, 1931 S.C. 149.
(*z*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Agreement, exemption (3).
(*a*) 12 & 13 Geo. 6, c. 47, s. 35 and Sched. VIII, Part I, paras. 9, 17 and 18.
(*b*) 54 & 55 Vict. c. 39.
(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 29. It appears that in Scotland (now the only place affected by duty on bank notes) this provision is regarded as prohibiting the issue of notes in denominations of more than £100: see *Encyclopaedia of the Laws of Scotland*, Vol. 2, p. 77. By the Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38), s. 5, Scottish bank notes must be in multiples of £1.
(*d*) 7 & 8 Vict. c. 32, s. 7; see also Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 13), s. 6 (4).
(*dd*) 54 & 55 Vict. c. 39.

a licence to issue bank notes unstamped. This course must in fact usually be followed as a bank note with a stamp on it is almost unheard of. Foreign bank notes, not being legal tender here, do not, it is thought, fall within the charge to duty at all (*e*).

Bills of Exchange and Promissory Notes

(1) **Definitions.** The subject of negotiable instruments has the well-merited reputation of being one of the most difficult for the uninitiated to understand in any branch of the law. The question of the stamp duty payable on them lives up to this reputation. The difficulties are not lessened by the fact that the terms "bill of exchange" and "promissory note" are differently defined in the Bills of Exchange Act, 1882 (*f*), and the Stamp Act, 1891 (*g*), the latter definition being apparently the wider. It is only with the latter definition that we are now concerned. A bill of exchange is defined as including any draft, order, cheque and letter of credit and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any person for, any sum of money (*h*). A promissory note includes any document or writing (except a bank note) containing a promise to pay any sum of money (*l*)—this includes a promise to pay out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen (*m*).

Both these definitions are wide enough to include many instruments that are not negotiable at all. But in other respects they are hardly comparable. The definition of a bill of exchange contains a series of words such as "draft" and "order" themselves of more or less indeterminate meaning. It emerges from the authorities that it is the commercial character of the document that is decisive in the matter, and the precise form of the document is not relevant. Thus a special form of receipt designed to function as a cheque for an amount less than £2 (thus not requiring a receipt stamp) (*n*), and a direction to a banker to transfer money from the account of one customer to that of another (*o*), are within the charge to duty in addition to the usual forms of bill of

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (3).
(*f*) 45 & 46 Vict. c. 61.
(*g*) 54 & 55 Vict. c. 39.
(*h*) *Ibid.*, s. 32.
(*l*) *Ibid.*, s. 33 (1).
(*m*) *Ibid.*, s. 33 (2).
(*n*) *Midland Bank, Ltd.* v. *I. R. C.* [1927] 2 K.B. 465.
(*o*) *London Clearing Bankers' Committee* v. *I. R. C.* [1896] 1 Q.B. 542.

exchange and cheque. Likewise a coupon for the payment of interest on a bearer security was within the charge until specifically exempted from duty (*p*). The bill must be for a sum of money of fixed amount to be within the charge to duty (*q*); hence, for instance, a coupon for the payment of a dividend on a bearer share is not chargeable.

The definition of promissory note by comparison contains no vague words but taken literally it is very wide. Indeed it appears at first sight to cover any binding obligation to pay money. Judicial decisions have limited the effect of the definition. First, it is just as necessary in the case of a promissory note as a bill of exchange that the amount should be certain (*r*). Secondly, it has been judicially stated that the Act cannot apply to a document not given or accepted as a promissory note though the words of the Act may be wide enough on one interpretation to cover it (*s*), and that the promise to pay must be the substance of the instrument (*t*). Thus, a promise to pay a sum of money on the signing of a lease (*u*), a single premium policy of assurance providing for a payment on maturity or for a lesser sum before maturity (*a*), and a promise by A to pay to B a sum he had previously promised C he would pay to B (*b*), have all been held not to be promissory notes. Moreover, a mere IOU or acknowledgment of indebtedness is not a promissory note (*c*) unless it includes a promise to pay on demand or at a specified time (*d*).

The First Schedule to the Stamp Act, 1891 (*e*) and also subsequent Acts contain a number of exceptions. Reference must be made to these Acts for particulars.

Reference has previously been made to the narrow distinction that sometimes has to be drawn between a bill of exchange, an equitable assignment and a letter of attorney (*f*). Similarly a promissory note, at any rate if given by a body corporate, is not

(*p*) *Rothschild & Sons* v. *I. R. C.* [1894] 2 Q.B. 142. For exemption see Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Bill of Exchange Exemption (11); and Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40.

(*q*) *Jones* v. *Simpson* (1823) 2 B. & C. 318

(*r*) *Mortgage Insurance Corpn.* v. *I. R. C.* (1888) 21 Q.B.D. 352, *per* Lindley L.J. at p. 357.

(*s*) See *Yeo* v. *Dawe* (1885) 53 L.T. 125, *per* Brett M.R. at p. 126.

(*t*) See *Mortgage Insurance Corpn.* v. *I. R. C.* (1888) 21 Q.B.D. 352, *per* Lindley L.J. at p. 357.

(*u*) *Yeo* v. *Dawe* (1885) 53 L.T. 125.

(*a*) *Mortgage Insurance Corpn.* v. *I. R. C.* (1888) 21 Q.B.D. 352.

(*b*) *Wirth* v. *Weigel Leygonie & Co., Ltd.* [1939] 3 All E.R. 712.

(*c*) *Melanotte* v. *Teesdale* (1844) 13 M. & W. 216; *Moffat* v. *Edwards* (1841) Car. & M. 16.

(*d*) As in *M'Taggart* v. *MacEachern's Judicial Factor*, 1949 S.C. 503; *Waithman* v. *Elsee* (1843) 1 C. & K. 35.

(*e*) 54 & 55 Vict. c. 89.

(*f*) See Vol. 17, p. 499.

easily distinguishable from, and may be chargeable to duty as, a debenture (*g*), or even as a marketable security (*h*), the duty on both of which is higher than the duty on a promissory note.

(2) **Rates of duty.** Cheques and other bills of exchange payable on demand, or not more than three days after sight, are liable to the fixed duty of 2d. These have already been considered (*l*), and other bills of exchange will be referred to here as "time bills." All time bills and all promissory notes (even if payable on demand (*m*)) are liable to *ad valorem* duty according to a scale which starts at 2d. (*n*) where the amount does exceed £10, rising to 1s. where the amount exceeds £75 but does not exceed £100, and rising thereafter at the rate of 1s. per £100. In the case of time bills of exchange (but not promissory notes) drawn and expressed to be payable out of the United Kingdom the rate, where the amount of the bill exceeds £50, is half the rate applicable to other time bills with a minimum of 6d. (*o*). If bills are issued in a set and negotiated together only one need bear duty (*p*).

(3) **Special provisions as to duty.** The fixed duty of 2d. on bills of exchange payable on demand or within three days after sight is payable by adhesive postage stamp or by ordinary impressed stamp (*q*). On all time bills and all promissory notes, even if the duty is only 2d., an appropriated stamp, *i.e.*, a stamp which can be used only on bills of exchange and promissory notes (*r*), must be used. In the case of a time bill or promissory note drawn and made in the United Kingdom it must be an impressed stamp (*s*), in the case of a bill or note drawn or made out of the United Kingdom it may be an adhesive stamp (*t*). Moreover,

(*g*) *British India Steam Navigation Co.* v. *I. R. C.* (1881) 7 Q.B.D. 165.

(*h*) *Brown, Shipley & Co.* v. *I. R. C.* [1895] 2 Q.B. 598; *Speyer Bros.* v. *I. R. C.* [1908] A.C. 92.

(*l*) See Vol. 17, p. 489.

(*m*) *Oettinger* v. *Cohn* [1908] 1 K.B. 582.

(*n*) Stamp Act, 1891 (54 & 55 Vict c. 39), Sched I: Bill of Exchange. This 2d. stamp is not covered by s. 34 and an ordinary postage stamp is not sufficient.

(*o*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10.

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 39.

(*q*) The relevant provisions were considered in connection with cheques; see Vol. 17, p. 489.

(*r*) See as to appropriated stamps Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 10. There is no statutory requirement of an appropriated stamp on bills of exchange or promissory notes, though such a requirement appears to be implied in s. 37. It is thought that s. 10 authorises the Commissioners to introduce stamps appropriated to any instrument requiring a stamp and that, quite apart from s. 37, the introduction of stamps appropriated to bills of exchange and promissory notes is authorised.

(*s*) There being nothing on this point to counteract s. 2.

(*t*) *Ibid.*, s. 34 (2). A bill or note purporting to be drawn or made abroad is for this purpose deemed to be drawn or made abroad: *ibid.*, s. 36.

subject to exceptions, an impressed stamp must be affixed before execution (*u*). A bill or note stamped before execution to the correct amount but not with appropriated stamps may be stamped with appropriated stamps after execution on payment of a penalty (*a*). The want of a stamp, therefore, goes to the validity of the instrument.

There are two (*b*) cases in which bills and notes with a foreign element in them can be stamped after execution. Bills of exchange and promissory notes being negotiable instruments, it has been thought necessary to make provision for stamping them where, if section 14 (3) of the Act (which deals with the circumstances where an instrument executed abroad must be stamped to be admissible in evidence in the United Kingdom) was the only relevant section, they might escape liability. The Act accordingly provides that every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom comes before it is stamped shall, before he presents it for payment or indorses, transfers, or by any means negotiates or pays it, affix a proper adhesive stamp or stamps of sufficient amount to it and cancel the stamp or stamps (*c*). The second case in which an unstamped bill or note may be stamped after execution is in the case of a bill or note, wherever drawn or made, which is presented for payment, or payable, outside the United Kingdom. These may be stamped after execution with an impressed stamp on payment of the duty and penalty (*d*).

Fines are imposed for issuing, transferring, indorsing, negotiating, or presenting for payment, any bill or note not duly stamped (*e*), and for failure to cancel an adhesive stamp (*f*).

Policies of Insurance

Policies of insurance for purposes of stamp duty fall into three groups: policies of sea insurance, policies of life insurance and other policies of insurance. Different provisions apply to each. The expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made or is

(*u*) *Ibid.*, s. 37 (2).
(*a*) *Ibid.*, s. 37 (1).
(*b*) The right of the drawee of a cheque or bill of exchange (other than a time bill) to stamp after execution under s. 38 (2), has been considered in connection with cheques: see Vol. 17, p. 489.
(*c*) *Ibid.*, s. 35.
(*d*) Finance Act, 1933 (23 & 24 Geo. 5, c. 19), s. 42. For penalties see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15
(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38.
(*f*) *Ibid.*, s. 8.

evidenced, and the expression "insurance" includes assurance (*g*). Policies of insurance even if under seal are not regarded as dutiable under the heading "Mortgage, Bond, Debenture, Covenant" (*h*) by reason of the obligation of the insurer to pay insurance moneys, nor are they liable to Bond Covenant duty by reason of the provision for payment of premiums, if only because the usual form of policy does not impose an obligation to pay premiums but only makes payment of premiums a condition of securing the benefits of the policy.

(1) **Policies of sea insurance.** The Act contains a number of elaborate provisions relating to policies of sea insurance which the legislature seem to have regarded as requiring very special treatment. The rates of duty are not high, as there is a duty of 1d. (*k*) where the premium does not exceed 2s. 6d. per cent. of the sum insured. In other cases the rate for a single voyage is 6d. per £500 (*l*) of the amount insured, and the rate for a time not exceeding six months is 1s. 6d. per £500 and the rate for a time exceeding six, but not exceeding twelve, months (*m*) is 3s. per £500 (*l*). A policy of sea insurance is defined as including any insurance on any ship or vessel or its machinery, tackle or furniture, or on any goods, merchandise or property on board (*n*). There is an exemption in favour of the insurance on baggage or personal and household effects only, if executed outside Great Britain (*o*).

The Act provides (in the interests of better tax-collection) that a policy of sea insurance is void if not in writing (*p*), or if it does not specify the particular risk or adventure or the names of the subscribers or underwriters, or is not made for a period not exceeding twelve months (*q*). It further stipulates that, subject to an exception in favour of certain insufficiently stamped policies of mutual insurance, and of policies executed abroad which may be

(*g*) *Ibid.*, s. 91.

(*h*) *Prudential Insurance Co.* v. *I. R. C.* [1904] 2 K.B. 658, at p. 662.

(*k*) See *ibid.*, Sched. I: Policy of Sea Insurance No. (1); if the premium is liable to be increased on a contingency this is disregarded unless the contingency occurs, when the policy must be stamped up: see Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 8.

(*l*) *Ibid.*, Sched. I: Policy of Sea Insurance No. (2). A policy may be liable for two duties if made for voyage and time, or if a voyage policy covers the vessel for more than thirty days after the voyage is completed: *ibid.*, s. 94.

(*m*) A policy for more than twelve months is void: *ibid.*, s. 93 (2), but a continuation clause covering the possibility of the ship being at sea at the expiration of the twelve months is permitted within the limits laid down in Finance Act, 1901 (1 Edw. 7, c. 7), s. 11, but not otherwise: *Royal Exchange Assce.* v. *Sjoforsakrings Aktiebolaget Vega* [1902] 2 K.B. 384.

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 92. Reference should be made to this section for the full definition.

(*o*) Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 35 (3).

(*p*) *Ibid.*, s. 93 (1).

(*q*) *Ibid.*, s. 93 (3); see also s. 93 (2).

stamped within ten (*r*) (not thirty (*s*)) days after they are brought into the United Kingdom, no policy of sea insurance may be stamped after execution (*t*). There is, however, a proviso to this, that for purposes of their being admitted in evidence they may be stamped after execution on payment of a penalty of £100 (*u*). It would seem, therefore, that although the marginal note to the section in question (*a*) is "no policy valid unless duly stamped," yet the want of a stamp does not in fact go to the validity of the policy.

The Act imposes restrictions on the making of alterations in policies of sea insurance (*b*) and imposes fines on persons who enter into such policies when not duly stamped and who commit an assortment of other quasi-offences in relation to such policies (*c*).

(2) **Policies of life insurance.** Policies of life insurance are charged with duty at a rate which rises to 10s. where the amount insured is £1,000 and thereafter the rate is 10s. per £1,000 (*d*). A policy of life insurance means a policy of insurance on any life or lives, or upon any event or contingency relating to or depending on any life or lives, but it does not include a policy of insurance against death by accident only. A policy for the payment of money on death or attaining a specified age is a policy of life insurance (*e*), but not a policy with a provision merely for the return of premiums on death (*f*).

Fines are imposed by the Act on persons who do not make out a duly stamped policy of life insurance within one month of receiving any premium and on persons who pay out on unstamped policies (*g*). A fine is also imposed on any person paying out money to the assignee of a policy of life insurance where the assignment is not duly stamped (*h*).

A policy of life insurance, the benefit of which is under section 11 of the Married Women's Property Act, 1882 (*l*), or otherwise by the policy given to or settled on another or others, may

(*r*) *Ibid.*, s. 95 (1) (b).
(*s*) The usual period under s. 15 (3).
(*t*) *Ibid.*, s. 95 (1). Subs. (1) (a) provides for the stamping up of mutual insurance policies where subsequent to execution the amount insured is increased.
(*u*) *Ibid.*, s. 95 (2).
(*a*) It is not usually permissible to look at marginal notes in interpreting Acts of Parliament: see *Nixon* v. *Att.-Gen.* [1930] 1 Ch. 566, at pp. 593–4.
(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 96.
(*c*) *Ibid.*, s. 97.
(*d*) *Ibid.*, Sched. I: Policy of Life Insurance.
(*e*) *Prudential Assurance Co.* v. *I. R. C.* [1904] 2 K.B. 658.
(*f*) *General Accident Assurance Corpn.* v. *I. R. C.* (1906) 8 F. (Ct. of Sess.) 477.
(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100.
(*h*) *Ibid.*, s. 118.
(*l*) 45 & 46 Vict. c. 75.

be liable (*m*) to an additional stamp of 10s. as a Declaration of Trust or (if the policy from its inception has any value) as a Voluntary Disposition or (if it is not a voluntary disposition and has any such value or provision is made for keeping it up (*mm*)) as a Settlement.

(3) **Other policies of insurance.** The Stamp Act, 1891 (*n*) as amended (*o*) specifically imposes a duty of 6d. (which may be denoted by an adhesive stamp (*p*)) on policies of insurance against accident (including fatal accident (*q*)) and against loss of or damage to property. It includes any notice in any newspaper which purports to insure the bearer against these things or any of them (*r*). Other policies of insurance are liable to duty of 6d. as agreements if under hand or 10s. if under seal (*s*). As the rate of 6d. applies in most cases, the distinction is not often of importance. A policy of indemnity against liability to another for accident was not originally within the charge to duty on a policy of insurance against accident (*t*), but has been brought in where the annual premiums do not exceed £2 (*u*).

No additional duty is chargeable on a policy of insurance against accident by reason of its extending to payments during sickness or incapacity (*a*).

The same fines are imposed upon persons who fail to issue duty-stamped policies within one month of receiving any premium, or who pay out on unstamped policies as in the case of life insurance policies (*b*). It is thought that in view of the wide definition of policy of insurance (*bb*) these fines are applicable both to policies liable to duty as such and to policies liable to duty as agreements.

When any person so carries on the business of insurance against

(*m*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Declaration of Trust and Settlement; and Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74.

(*mm*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 104.

(*n*) 54 & 55 Vict. c. 39, Sched. I: Policy of Insurance against Accident, etc.

(*o*) By Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 40. The original duty was 1d.

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 99. The stamp may be an ordinary postage stamp: *ibid.*, s. 7.

(*q*) For a definition of policy of insurance against accident, see s. 96.

(*r*) See *ibid.*, s. 98 (1); Finance Act, 1895 (58 & 59 Vict. c. 16), s. 13; Finance Act, 1907 (7 Edw. 7, c. 13), s. 8.

(*s*) *Lancashire Insurance Co.* v. *I. R. C.* [1899] 1 Q.B. 353.

(*t*) See *Mortgage Insurance Corpn.* v. *I. R. C.*, as reported (1886) 57 L.J.Q.B. 174; appeal on another point (1888) 21 Q.B.D. 332.

(*u*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 11, as amended by Finance Act, 1907 (7 Edw. 7, c. 13), s. 8 (3).

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 98 (2).

(*b*) *Ibid.*, s. 100. See *supra*, note (*g*).

(*bb*) *Ibid.*, s. 91.

accident (*c*), sickness or incapacity from personal injuries (*d*), or by way of indemnity against loss or damage to property (*e*), that, in the opinion of the Commissioners, it is impracticable or inexpedient to require a stamp duty of 6d. to be charged and paid on the policies (as in the case of insurance of registered readers of newspapers (*f*)), the Commissioners may enter into an agreement for the delivery of quarterly accounts of all sums received as premiums on such policies. Such quarterly accounts are then charged with a composition payment of £5 per cent. which is recoverable as a debt due to Her Majesty (*g*). A penalty of 10 per cent. of the duty is exigible for each month's default in delivering the account (*h*).

A somewhat similar set of provisions for a so-called "composition" applies to persons carrying on industrial assurance business, the Commissioners being authorised to enter into agreements with such persons under which they may issue policies unstamped and pay the duty that would have been payable on the policies if they had been stamped, in accordance with a quarterly account to be delivered to the Commissioners (*j*). The amount shown in the account is recoverable as a debt due to Her Majesty together with interest at 5 per cent. per annum, and a penalty of £50 per day for default in delivering the account or making the payment (*k*).

Contract Notes

Persons in the habit of investing on the Stock Exchange will be familiar with the contract note which is sent to them by their brokers advising them of a sale or purchase made on their behalf. These are the contract notes which every person who effects any sale or purchase of any stock or marketable security (*l*) as broker or agent, and any person who by way of business deals, or holds himself out as dealing, as a principal in any stock or marketable security, and buys or sells any such stock, is required to make and execute and transact to his principal, purchaser or vendor, if

(*c*) *Ibid.*, s. 116.
(*d*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 13.
(*e*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 8.
(*f*) See the definitions in Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 98 (1).
(*g*) *Ibid.*, s. 116 (4).
(*h*) *Ibid.*, s. 116 (5).
(*j*) Finance Act, 1948 (11 & 12 Geo. 6, c. 49), s. 72.
(*k*) *Ibid.*, s. 72 (4).
(*l*) The definition of "stock" and "marketable security" will be considered in a later article. Units under a unit trust scheme are not only included in the definition of stock (Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 54 (1), (2)), but are brought within the duty on contract notes by special provisions: *ibid.*, s. 54 (6).

the value of the stock or marketable security is £5 or upwards (*m*). There is an exception in favour of certain transactions between members of stock exchanges in the United Kingdom made in the ordinary course of business (*n*). There is a fine of £20 for failure to make, execute, or transmit such a note (*o*), or for failure to stamp it properly (*p*), and an action for commission brokerage or agency fee is not maintainable if the foregoing provisions are not complied with (*q*). The broker may add the duty to his charges (*r*).

The rate of duty originally fixed in its present form by the Finance (1909–10) Act, 1910 (*s*), was doubled by the Finance Act, 1947 (*t*), and rises by stages from 1s., where the value of the stock or marketable security is not less than £5 nor more than £100, to £2 where the value exceeds £20,000. Duty at half these rates is levied where the subject-matter of the sale or purchase is an option to purchase any stock or marketable security (*u*). Where the contract note relates to more than one description of stock or marketable security it is to be stamped as if it were a separate note in respect of each (*a*). Where, as a method of postponing settlement, a person enters into a transaction of sale of stock or marketable security with a promise to repurchase, a continuation or carrying over note is issued and duty is payable only on the sale or the purchase whichever duty is the higher (*b*). It is to be noted that duty is levied on the value not the price. The price and the value will usually be the same, but in certain cases, *e.g.*, continuation notes or sale of options, it may not be.

The duty must be denoted by an adhesive stamp appropriated to contract notes, which must be cancelled by the person executing the note (*c*). It therefore cannot be stamped after execution.

(*m*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 77.
(*n*) See *ibid.*, s. 77 (3).
(*o*) *Ibid.*, s. 78 (1).
(*p*) *Ibid.*, s. 78 (2).
(*q*) *Ibid.*, s. 78 (3).
(*r*) *Ibid.*, s. 78 (5).
(*s*) 10 Edw. 7, c. 8, s. 77.
(*t*) 10 & 11 Geo. 6, c. 35, s. 52.
(*u*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 79.
(*a*) *Ibid.*, s. 77 (4).
(*b*) *Ibid.*, s. 77 (2). This is commonly known as "contango."
(*c*) Finance (1909–10) Act, 1910, s. 78 (4).

(*To be concluded*)

REGISTERED LAND—THE STATE GUARANTEE

By Theodore B. F. Ruoff, Solicitor

Curative effects of first registration

It is, perhaps, not too much to claim that one of the most useful functions of H.M. Land Registry is to cure a multitude of miscellaneous defects in unregistered titles. This is a matter of daily routine and the effects of the remedy of first registration are usually lasting. And whereas the quality of an unregistered title is a matter of opinion about which differing views may be held, the quality of a registered title is one of hard fact. Thus every day, for example, the unrealistic dimensions of a crude plan drawn on some conveyance are replaced by the true topographical picture of the Ordnance Survey map; inelegancies and inaccuracies of language that have given rise to vainly repeated requisitions upon title through the years cease to have importance; and, even where there has been grave doubt whether the legal estate is properly vested, it becomes vested in a manner that is no longer open to conjecture.

Past faults no longer vex each successive owner after the date of first registration with absolute title because thenceforth the proprietor is deemed to have vested in him the fee simple absolute in possession, subject to the incumbrances that appear on the register of title, and subject also to certain well-recognised incumbrances, interests, rights and powers (known as overriding interests) which may not appear on the register, but free from all other estates and interests whatsoever (Land Registration Act, 1925, s. 69 (1), (5)) (*a*). These are not idle words. The whole essence of the matter is that after the date of first registration it is neither necessary nor permissible to go behind the impenetrable curtain of the register. Indeed, when registering an owner's title as absolute, the Chief Land Registrar has wide powers of destroying title deeds (*b*). He does not exercise these but, if he were to do so, his action would emphasise the conclusiveness of the register and the irrelevance of earlier or other records of entitlement. The foregoing remarks do not, of course, apply to those titles which the Chief Land Registrar has deliberately labelled as being defective or deficient, namely,

(*a*) This is the Act the sections of which are referred to throughout this article, unless the contrary is indicated.

(*b*) Land Registration Rules, 1925, r. 310.

possessory and qualified titles (see sections 6, 7). Nor do they apply with full force to a first proprietor who is not entitled to the land for his own benefit; he, of course, holds subject to the interests of the beneficial owners (section 5 (c)).

Insurance by the State

The curative results that are brought about by first registration are the direct result of imaginative legislation plus bold administration. The examination of title by the Land Registry on first registration is conducted along prescribed lines (section 13). Certain precautions, such as the issue of advertisements, and the service of notices, need to be taken. If, in the result, the Chief Land Registrar is not prepared to extend his guarantee to a particular title, he is entitled to withhold it and not even the court can order him to change his mind (*Dennis* v. *Malcolm* [1934] Ch. 244). On the other hand if, upon his examination of any title, the Chief Land Registrar is of opinion that although the title is open to objection, it is nevertheless one the holding under which will not be disturbed, he may approve of it (section 13, proviso (c)). Thus landowners can obtain an improved title through first registration (*Re Suarez* (*No.* 2) [1924] 2 Ch. 19) and, in fact, they often do so. Immediately a title is registered it becomes guaranteed by the State which thenceforth is liable to recompense the owner if his title is upset. In a sense, therefore, the applicant for first registration enters into a contract with the State for insurance against defects overlooked by himself or his solicitors—or even defects known to him and candidly disclosed—and any profit made out of the fees he pays may be regarded as a premium. On the other hand, the Chief Land Registrar, as insurer, is able to accumulate a store of specialised knowledge about the compulsory areas which enables him to conduct registration upon the most efficient business lines and to offer the best terms to applicants in those districts.

Since the turn of the present century, and especially since 1925, successive Chief Land Registrars have tended to grant absolute title with increasing freedom. Today, landowners in the compulsory areas who must content themselves with mere possessory titles represent less than one per cent. of those who apply for registration, and, even where title deeds have been totally destroyed or seriously damaged by enemy action, absolute title can be granted in 95 out of 111 applications (*c*).

It is the purpose of this article to examine what is meant by a

(*c*) This happened in 1952. See the Chief Land Registrar's Report on the work of H.M. Land Registry for 1952–53.

state-guaranteed title and to consider its worth. The phrase " state-guaranteed title " does not appear in any Act of Parliament. It is simply a convenient way of describing the provisions of the Land Registration Acts which ensure that persons who suffer loss because of errors in and omissions from the register of title shall have that loss made good (*d*). English registered titles are described as " absolute " (sections 4, 5), thereby indicating that they are, so far as is humanly possible, complete and perfect. Although Lord Westbury's original Land Registry Act of 1862 made provision for granting (after an exhaustive scrutiny covering at least 60 years of an absolutely flawless title), what was called " indefeasible " title (*e*), and although that word is commonly used throughout the British Empire to denote registered titles that are entirely conclusive and incontrovertible (*f*), it is somewhat misleading. This is obvious when it is remembered, for example, that a title gained by fraud can always be upset in any jurisdiction unless an innocent purchaser has become registered as owner (*g*). It is equally plain, for example, that if two different persons are by mistake both entered on the record as the owner of the same land, the State cannot magically arrange that each of them shall have that land. Therefore the guarantee given to the registered estate is inevitably to some extent a qualified one (*cf.* section 82 (2)).

English registered titles are more freely examinable and more easily upset by the courts than registered titles elsewhere. Perhaps this is because in this country Parliament has never ventured to make the laws relating to registered titles an entirely separate code from those governing unregistered titles (*h*). However, whereas in other jurisdictions the courts regard registered titles as being so rigidly sacrosanct that they will not rectify the register even, for example, where a local authority has registered its title after appropriating land without a semblance of legality (*k*), the English courts, in the interests of fair dealing and justice, can and do order rectification for many and diverse reasons (section 82 (1)). This flexible feature of English registered conveyancing makes it essential that a displaced owner should be compensated for his loss and it is

(*d*) According to the Report of the Land Transfer Committee under Lord Tomlin (1935, Cmd. 4776), the phrase " state guarantee " is not properly applied to the title of the registered proprietor unless reference is made to the effect of overriding interests (s. 70), and the exclusion of mines and minerals from the provisions as to indemnity (s. 83 (5) (b)).

(*e*) 25 & 26 Vict. c. 53, ss. 14, 20 *et seq.*

(*f*) See, *e.g.*, *Assets Co.* v. *Mere Roihi* [1905] A.C. 176; *Creelman* v. *Hudson Bay Insurance Company* [1920] A.C. 194; *Boyd* v. *Mayor of Wellington* [1924] N.Z.L.R. 1174.

(*g*) See, *e.g.*, *Assets Co.* v. *Mere Roihi* (*supra*).

(*h*) *Cf. Lewis* v. *Keane* (1936) S.R.(N.S.W.) 493.

(*k*) *Boyd* v. *Mayor of Wellington* (*supra*).

noteworthy that in this country it is not necessary for him to bring, or attempt to bring, a preliminary and fruitless action against the person who has caused the loss before he claims indemnification from the State. Such, however, is the case in other countries which have universal registration of title (*l*).

This is simply another way of saying that in England and Wales a claim for rectification of the register and one for indemnity are complementary remedies. One of the objects of the registered system is to give certainty to the title to land. This is achieved by provisions which ensure that the registered proprietor who is in possession is upheld as the owner. But if, according to the general law, it is wrong, or unjust, or impossible to recognise the registered proprietor as owner, he may in suitable circumstances be deprived of his proprietorship through rectification. And in that event, apart from factors like fraud, he becomes entitled to compensation.

Occasionally some cynical persons, who have not troubled to acquaint themselves with the facts, speak as if the benefits of a guaranteed title were illusory and the existence of the Land Registry insurance fund of little value to landowners. They even claim that it virtually cannot be broached. Such observations are repeated by the opponents of land registration and yet these notions are, as the writer will amply demonstrate, entirely false. Unfortunately, the authors of some textbooks and articles in the legal press have from time to time allowed themselves to be deluded on this point. Even the late Dr. Potter, who was not only a leading exponent of real property law but also, incidentally, one who favoured land registration, reached wrong conclusions when he came to deal with this subject. He wrote that " . . . the main purpose of the system of registration in this country is to simplify conveyancing and not to provide guaranteed titles to land " (*m*). And again, he enunciated " the general principle that to rectify a register against a person having no title to be there is not to occasion him loss " (*n*). Not only is there no such general principle (which assumes that a title gained by registration can never be better than an unregistered one), but there is an entirely contrary general principle. It is this, that if a person, *though having no*

(*l*) *Cf.* Real Property Act, 1900 (of New South Wales), s. 126, under which the person who is deprived of land must have pursued a fruitless remedy against the person who has deprived him before he can claim against the assurance fund.

(*m*) The Principles of Land Law under the Land Registration Act, 1925, (2nd ed.), p. 97.

(*n*) *Ibid.*, p. 95. It is fair to remember that at the time of writing Dr. Potter had *Chowood's* case (see *post*) as his principal authority. Nevertheless it seems that his views were coloured by his reading of Australian cases, which have no application in England because the statutes and conceptions upon which those decisions are based are radically different from anything we have in this country.

title to land, yet becomes registered as proprietor of that land with absolute title, he will prima facie be allowed to keep it; but if he is deprived of his land, he will prima facie be compensated for his loss. The rest of this article is devoted to an examination of these propositions.

Grounds for rectification

It would not serve the purpose of this article to deal at length with all the legal and factual situations that may give rise to rectification. Yet some indication is needed. Broadly speaking, there seem to be six cases where rectification can take place, as follows:—

By order of the High Court (*o*).

1. Where the court decides that someone other than the registered proprietor is entitled to a registered estate, right or interest (section 82 (1) (a)).

2. Where the court is satisfied that someone is aggrieved by some entry, omission, default or delay (section 82 (1) (b)).

By order of the High Court or by an order or decision of the Chief Land Registrar.

3. By consent (section 82 (1) (c)).

4. After fraud (section 82 (1) (d)).

5. Where the legal estate is vested in the wrong person. This embraces a wide field, and the situation may arise from a mistake, the state of the law, or circumstances causing a change in the legal ownership. Included under this heading are the mistaken registration of two people as owners of the same land (section 82 (1) (e)); the registration of a mortgagee instead of his mortgagor (section 82 (1) (f)); the erroneous registration of an infant (*cf.* section 82 (1) (g)); foreclosure (section 34 (3)); loss of title through adverse possession (sections 34 (2), 75 (2)); or deprivation through the existence of a paramount title (Land Registration Rules, 1925, r. 131).

6. Where owing to an error or omission in the register it is deemed just to rectify (section 82 (1) (h)).

But these prima facie grounds for rectification are qualified by provisions which secure the registered proprietor against interruption of his possession of his land and only allow rectification against him in quite exceptional circumstances. Section 82 (3) cuts down

(*o*) The phrase used in s. 82 (1) (a) is "a court of competent jurisdiction." Normally, only the High Court has jurisdiction over registered property as such (ss. 3 (ii), 138); but this distinguishing phrase suggests that a Palatine Court or a county court might have jurisdiction to order rectification where, apart from the fortuity that the title happens to be registered, such a court would have power to make an order of comparable effect in regard to unregistered property.

the jurisdiction of the High Court and of the Chief Land Registrar by stating:—

"The register shall not be rectified except for the purpose of giving effect to an overriding interest, *so as to affect the title of the proprietor who is in possession*—

(a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or

(b) unless the immediate disposition to him was void (*p*), or the disposition to any person through whom he claims otherwise than for valuable consideration was void; or

(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him" (*q*).

This important subsection will be referred to again hereafter.

Eligibility for Compensation

If any of the following persons suffer actual loss in the circumstances outlined below they are entitled to be indemnified out of the Land Registry insurance fund:—

1. A person who suffers loss from a rectification of the register (section 83 (1)). A proprietor of any registered land or charge claiming in good faith under a forged disposition is deemed, where the register is rectified, to have suffered loss by reason of the rectification and, hence, he will be entitled to indemnity (section 83 (4)).

2. A person who suffers loss from an error in or omission from the register, because it is not rectified (section 83 (2)).

3. A trustee in bankruptcy, where loss is suffered by the estate of a debtor-proprietor because of the omission of the Chief Land Registrar to register a creditor's notice or bankruptcy inhibition (section 61 (7)).

4. A trustee in bankruptcy, where loss is suffered by the estate of a debtor-proprietor on account of the execution or registration of a disposition after a bankruptcy petition or a receiving order has been registered under the Land Charges Act, 1925, but before the registration of a creditor's notice or bankruptcy inhibition (*ibid.*).

5. A person, other than the registered proprietor, who suffers loss by reason of any entry on the register made on conversion of a

(*p*) This contemplates a deed that is void as a whole, not merely one which, as to one part of the land, purports to convey something to which the disponor was not entitled (*cf. Re 139 Deptford High Street* [1951] 1 Ch. 884, at p. 892).

(*q*) The double negative is remarkable. Wide as this power is, there are limits to its application (see, *e.g.*, *Hodges* v. *Jones* [1935] Ch. 657).

weak title into absolute or good leasehold title. The matter will be treated as if a mistake had been made in the register (section 77 (6)).

6. The proprietor of a registered charge made for securing further advances, who suffers loss over a further advance because of the failure of the Chief Land Registrar or the post office to give him notice of a potentially prejudicial entry on the register subsequent to his charge. The matter is treated as if a mistake had occurred in the register unless the chargee has caused the omission by neglecting to keep his address for service up to date (section 30 (2)).

7. A person who suffers loss because of the inaccuracy of an office copy of the register or filed documents and plans (section 113).

8. A person who suffers loss through the loss or destruction of a document lodged at the Land Registry for inspection or safe custody (section 83 (3)).

9. A person who suffers loss through an error in an official search (*ibid.*).

10. A person who suffers loss through an error or omission in a filed abstract, copy, or extract of a filed document (section 110 (4)).

11. In addition, although there is no claim as of right, the Chief Land Registrar is given a discretion to compensate a purchaser whose title has been prejudiced by the registration of another person pursuant to the Limitation Act, 1939 (section 75 (4)). In determining whether or not indemnity should be awarded the Chief Land Registrar would doubtless consider whether the applicant had by his negligence caused or contributed to the loss but, even so, the writer finds it difficult to envisage facts in which justice would require that an owner who had, in the nature of things, been ousted by his own laches ought to be compensated. Certainly, he would have no remedy in unregistered conveyancing.

The principles demonstrated

It will be apparent from what has been said that the chief justifications for paying indemnity are two, namely, either, that the register has been rectified so as to cause loss (section 83 (1)), or, that the register has not been rectified, thus causing or perpetuating a loss (section 83 (2)).

In considering whether some person (either a registered proprietor, or an unregistered owner) has suffered loss in either of these ways it is necessary to examine his position on two out of three occasions. These are, in chronological order: (A) the position before someone has been registered as proprietor of the land in question; (B) the position after registration but before rectification

has been granted or refused; and (C) the position after rectification has been granted or refused.

When seeking to discover whether a registered owner who has been deprived of his land by rectification has suffered loss it is necessary to look at his position under (B), that is, after he has been registered but before rectification, and to compare it with that under (C), that is, after rectification. It is not material, as Dr. Potter supposed, to consider his position under (A). If his position at (C) is worse than it was at (B) he is prima facie a loser and so entitled to compensation. That is to say, indemnification is based upon loss *through rectification* (*cf.* section 83 (1)). However, in considering whether someone who has not been registered as a proprietor has suffered loss it is necessary to compare his position at (A) with that at (C). The position of the registered proprietor at (B) is immaterial. If the position of the claimant at (C) is worse than it was at (A) he is prima facie a loser and so entitled to compensation. That is to say, in this case indemnification is based upon loss *through non-rectification* (*cf.* 83 (2)).

These propositions may be demonstrated by reference to the only two instances under the modern law where the principle has been brought before the courts. These are the decisions in *Chowood* v. *Lyall* (2) [1930] 1 Ch. 426, affirmed [1930] 2 Ch. 156, coupled with *Re Chowood's Registered Land* [1933] Ch. 574, and *Re* 139 *Deptford High Street* [1951] 1 Ch. 884. For the sake of simplicity in explanation it is convenient to deal with the *Deptford* case first. The reader will recall that a gentleman who rejoiced in the name of Dobkins, having purchased an unregistered shop and an annexe, became registered at the Land Registry as first proprietor with an absolute title. In the conveyance to Mr. Dobkins the land was conveyed by description without any plan, and both the vendor and Mr. Dobkins mistakenly believed that the property conveyed included in its description the annexe, although in fact this annexe was owned by the British Transport Commission. The plan in the land certificate which was issued to Mr. Dobkins showed plainly that his title included both the shop and also the annexe. On an application by the British Transport Commission for rectification of the register it was held that the Commission was entitled to rectification because the purchaser had substantially contributed to the mistake in registration within the meaning of section 82 (3) (a) by putting forward, quite innocently, a misleading description of the property for the purposes of registration. Mr. Dobkins thereupon sought compensation under the provisions of section 83 (1) and was awarded by the Chief Land Registrar out of the Land Registry insurance fund a sum equal to the estimated value of the annexe,

and costs, amounting in all to £1,278. The position may be summarised thus:—

DEPTFORD CASE

(A) Before registration	(B) Before rectification proceedings	(C) After rectification proceedings
Dobkins owned the shop. British Transport Commission owned the annexe.	Dobkins, *although he had no title to be registered,* was registered as owner of the shop and the annexe. British Transport Commission therefore owned nothing.	Dobkins owned the shop. British Transport Commission owned the annexe. Dobkins, having lost the annexe, was paid the value of it (including costs) out of the insurance fund.

A number of lawyers, the writer among them, consider that the *Deptford* case was wrongly decided in one respect, namely, that the learned judge did not give sufficient weight to the fact of the respondent's possession (*cf.* section 82 (3)). But that matters little because, even if there had been no order for rectification, the principle of indemnification would have remained the same (*r*), thus:—

DEPTFORD IN REVERSE

(A) Before registration	(B) Before rectification proceedings	(C) After rectification proceedings
Dobkins owned the shop. British Transport Commission owned the annexe.	Dobkins owned the shop and the annexe. British Transport Commission therefore owned nothing.	If rectification had been refused, Dobkins would still own the shop and the annexe. British Transport Commission would own nothing and, having lost the annexe, would be entitled to payment of its value, and costs (presumably something less than £1,278, because Dobkins spent money on repairing it).

(*r*) See observations of Wynn-Parry J. in [1951] 1 Ch. 884, at p. 892.

Chowood's cases may now be analysed similarly. Although some lawyers regard these decisions as a casuistical attempt to keep the insurance fund out of jeopardy, such an attitude seems to spring from a misapprehension of a principle which is applicable to unregistered and registered land alike, for some persons, having examined a satisfactory paper title to land, are loath to believe that it is worthless and that a sound, independent and conflicting title can exist. Yet such is the case with a title gained by squatting. In both registered and unregistered conveyancing rights that have been acquired under the Limitation Act, 1939, are rights that override the legal estate of the holder of the paper title. The only difference, in this respect, between the two systems is that, in order to tie up the loose ends of the statute neatly, overriding interests are expressly defined in relation to registered land. But, of course, these interests are not peculiar to registered conveyancing except in name.

The reader will remember that the facts of *Chowood's* cases were that Chowood, Limited, was registered as proprietor with absolute title of certain freehold lands which had been conveyed to the company. Amongst these lands were some strips of woodland to which a Mrs. Lyall had already acquired a good title by adverse possession. Although the woodlands were included in the parcels of the conveyance to Chowood, plainly the title to them did not thereby pass. The plan in the land certificate showed the woodlands as being included in the title, but nevertheless this was meaningless and valueless to Chowood because the company at all times held subject to Mrs. Lyall's title (see section 70 (1) (f), (g)). Mrs. Lyall established her squatter's title and succeeded in obtaining rectification of Chowood's register by the removal therefrom of her woodlands. Chowood then sued the trustees of the insurance fund claiming to be indemnified for the loss of the woodlands. It was held that the rectification for the purpose of giving effect to Mrs. Lyall's overriding rights put the company in no worse position after than before rectification and, having suffered no actual loss, the company was not entitled to indemnity (*s*). The position may be summarised thus:—

(*s*) There is a marked similarity between the facts of *Chowood's* cases and those of *Eastwood* v. *Ashton* [1915] A.C. 900, where a purchaser of unregistered land got damages for breach of the implied covenants. Chowood, Limited, could have pursued this remedy.

CHOWOOD'S CASES

(A) Before registration	(B) Before rectification proceedings	(C) After rectification proceedings
Chowood did not own the woodlands to which Mrs. Lyall had a sound squatter's title.	Chowood, having no title to be registered, was registered as the proprietor of lands including the woodlands. As to these woodlands, the registration took effect subject to the occupation and to the title of Mrs. Lyall. But an unrealistic "owning" of the woodlands in this manner was precisely the same thing as not owning them at all.	Chowood did not own the woodlands. However, rectification was no more than a realistic elucidation of Chowood's position, for Chowood's title was subject to Mrs. Lyall's estate *whether or not rectification took place.* The company lost nothing so was not entitled to compensation.

Contribution to the mistake

The provisions of section 82 (3), previously quoted (*t*), mean that an order for rectification ought not to be made against a registered proprietor who is in possession of the land unless one of the three conditions of that subsection is fulfilled (*Re 139 Deptford High Street* [1951] Ch. 884, at p. 889), although the title of a bona fide disposee for value remains inviolable (*Re Leighton's Conveyance* [1937] Ch. 149). In the *Deptford* case Wynn-Parry J. held that Mr. Dobkins had contributed to the mistake. He said, " . . . The determining factor is the circumstance that, so far as the physical aspect of the matter is concerned, the disputed land [the annexe] must have appeared to anyone looking at the properties in question to form part of 139 High Street, Deptford. It was, apparently, so obvious that the vendors to the respondent fell into the mistake, the respondent himself fell into the mistake, and the Land Registry fell into the mistake." But the learned judge added that, had he had to decide the case under paragraph (c), he would not have rectified the register but would have left the British Transport Commission to claim indemnity (*ibid.*, pp. 891–2).

On this question of contributory conduct, Luxmoore J. said at the original trial of the *Chowood* case: " The plaintiff company has, by its own act, that is, by the registration of a conveyance, which by itself is inoperative to pass the pieces of land in dispute, caused the mistake; that is, the inclusion of the pieces of land in dispute

(*t*) See p. 135, *ante*.

in the registered title . . . " (*Chowood, Ltd.* v. *Lyall* (2) [1930] 1 Ch. 426, at p. 438 (*u*). He considered that the power to rectify against the first registered proprietor depended upon the question of fact whether, up to the time of registration the claimant had been entitled to the land (*ibid.*, p. 433), and he was of the opinion that it would have been manifestly unjust not to rectify (*cf.* paragraph (c)). In the Court of Appeal, Hanworth M.R. remarked, in regard to subsection (3) of section 82, that " When once it has been determined that the person claiming rectification is in possession, that subsection does not apply and does not limit the power of [rectification]." (*Chowood, Ltd.* v. *Lyall* (2) [1930] 2 Ch. 156, 166.)

Meaning of Possession

These cases raise the crucial question: Who is to be regarded as being in possession? Or, more simply, what does possession mean? It is defined, unless the context otherwise requires, as including " receipt of rents and profits or the right to receive the same, if any " (section 3 (xviii)). Clearly, in the *Chowood* case Mrs. Lyall both occupied the land and had acquired the right of property called possession and, equally clearly, neither of these things was true of the registered proprietor (*cf.* [1930] 2 Ch. 156, 163–4).

In the *Deptford* case, the British Transport Commission had no physical control of the annexe but it certainly had an equitable right to possession, which the court converted into a legal right. Dobkins, of course, was in occupation of the annexe but it is arguable that he was simply a trespasser of a few weeks' standing. In both the *Chowood* and the *Deptford* cases rectification favoured the true owner and not the holder. It seems, therefore, that in section 82 " possession " indicates a proprietary right or a claim to it, rather than mere occupation unbacked by any rightful claim.

Practical Examples

A few practical examples may serve to clinch the foregoing arguments. Since the Land Registration Act, 1925, became law nearly £6,000 has been paid out in respect of successful claims against the Land Registry insurance fund (*v*). More often than not,

(*u*) As, however, the company was in no sense in possession, it is difficult to see why the learned judge discussed this point, for if the proprietor is not in possession, paragraphs (a), (b) and (c) of s. 82 (3) are irrelevant: see the remark of Hanworth M.R. quoted in the text, *infra*.

(*v*) The writer wishes to acknowledge his great indebtedness to the Chief Land Registrar for permission both to examine and to publish particulars of a number of claims about which no information has previously been made public. As explained in the text, there is no single instance in which the court has awarded

the land the subject of the claim has been a small area of no great monetary worth. The majority of claims concerned titles which had previously been rectified against the interest of the claimant, whose resulting loss was dealt with under the provisions of subsection (1) of section 83. The next largest number of claims falls within subsection (2) where rectification had been refused or, at all events, had not taken place. This class of claim included one for loss through forgery after an innocent purchaser had become the proprietor of the land, and two mistakes made in regard to bankruptcy proceedings (section 61 (7)). Some small payments have been made for the loss or destruction of documents (section 83 (3)), but, apparently, no claim for loss arising from the conversion of a title, or from a failure to serve notice, or from the inaccuracy of an office copy of a filed document, or from an error in an official search has ever been made.

As might be expected, many tentative and misconceived claims have been put before the Chief Land Registrar in the course of the past quarter of a century. In some instances the claims were abandoned. In others, they were withdrawn or not pursued after correspondence between the Land Registry and the claimant's solicitor, and after the Chief Land Registrar had refused to make an award, the claimant seeming to be unwilling to commence contentious proceedings. Most of the successful claims resulted from an award made by the Chief Land Registrar without a formal hearing. A few of them were awards made by order of the Chief Land Registrar after he had conducted a judicial hearing of the claim at which the parties were represented by counsel or by their solicitors. No claim that has come before the High Court has ever succeeded. The particulars of claims that follow may be of interest.

Awards arising out of rectification

Under this heading are awards made to a person who is deprived of an estate or interest which, because he trusted the register, he believed to be his.

1. A common instance of this kind of claim occurs where land which has wrongly been included in a title is removed on rectification and the deprived registered proprietor claims compensation for the loss of his land. Obviously any claim of this kind requires to be supported by evidence of the value of the interest from the

indemnity. That is to say, all successful claims have resulted from orders or decisions of the Chief Land Registrar and for that reason the public at large is quite unaware of the reality of the benefits of having a Land Registry insurance fund.

District Valuer, or other like proof, and a common-sense application of rule 278 of the Land Registration Rules, 1925, has acted as something of a deterrent to frivolous or trifling claims. This provides that the exact line of the boundary of a title will be left undetermined as, for instance, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the registered land includes the whole or any portion of an adjoining road or stream. Nevertheless, under this heading payments have been made as follows (the figures in brackets indicate the amount of the claim): £20 and £58 costs (£79); £20 and £4 costs (£66 and costs); £232 including costs; £1,068 and £200 costs (£1,251); £19—this concerned a minor amendment to a boundary and the claim related principally to interest on the purchase price of the land because, owing to the error, completion was long delayed; £200 and £40 costs (£450). *Chowood's* case was a notable failure under this heading being, of course, an entirely misconceived claim. The *Deptford* case resulted in a noteworthy success under this same heading.

2. Another example under this heading occurs where through an overlap two different persons are each registered as the proprietor of the same piece of land (*cf.* section 82 (1) (e)). One claimant was upheld as the proprietor of the land. The other, whose name was removed from the register, was paid £44 and £35 costs.

3. Also under this heading was an unusual claim for the expenses amounting to £10 and £27 costs, incurred by a registered proprietor in obtaining the addition to his title of a parcel of land that had wrongly been omitted from it.

4. In a number of instances the benefit of an easement has been unwarrantably or mistakenly entered as appurtenant to an owner's registered land. This has usually occurred on the occasion of a transfer of part of the land in a title. When, later, it has been found that the vendor did not grant, or did not have the power to grant the easement in question, the benefit of it was removed from the purchaser's registered title. The following sums have been paid for loss due to a deprivation of this kind, namely, £5 and £7 costs; £62 and £44 costs; and £382. Here again, a valuation by the District Valuer would seem to be a prerequisite to an assessment of the loss suffered.

5. The wrongful omission of the burden of easements has also led to loss, although usually (because the owner already knows about the liability) rectification alone is a sufficient remedy. The owner of a servient title has been paid, after the rectification of his register by the entry of the burden of an easement which had

been previously omitted by an error, £11, and, in another case, £20 and £7 costs, and, in yet another, £100 (£200 claimed). £217 has been paid out in respect of a claim for the expense of investigating the wrongful entry of easements. In yet another case a registered proprietor alleged that an erroneous entry on the register of his title to the effect that part of his land was subject to an easement, though later corrected, caused him loss through an abortive sale. He was paid £150 and £25 costs (£531 claimed). It is necessary to remember, however, that the Chief Land Registrar possesses a considerable discretion to omit adverse easements from the register (Land Registration Rules, 1925, rr. 41, 199).

6. Occasionally an incumbrance affecting land is omitted from the register either at the time of first registration or, subsequently, at the time of a transfer of part of the land in a title, or other dealing. Usually the omission is discovered before any harm has been caused; the solicitor for the proprietor draws the attention of the Chief Land Registrar to the fault and the register is corrected without delay and without harm to anyone. In one case the costs of investigating such an omission amounting to £38 were paid (£169 claimed).

Awards arising from non-rectification

Under this heading are awards made to a person who, although he has been legally entitled to an estate or interest, is permanently deprived of it because, for a sufficient reason, the register cannot be altered in his favour.

7. Land wrongly included in a registered title was not removed by rectification. The person who, before registration, had been the true owner of the land claimed against the insurance fund for the loss of it. He was paid £45 and £39 costs (£250 claimed). This is, of course, the situation described above as "Deptford in Reverse." In another instance land was wrongly included in a registered title but, as it had changed hands for value and a number of years had elapsed the Chief Land Registrar was unable to entertain a claim for rectification by the adjoining owner of unregistered property. The deprived claimant was paid £30 and £30 for the costs of a survey.

8. In contrast to the situation depicted in paragraph 6 (*supra*) is that where an incumbrance affecting registered land is omitted from the register of the burdened land which—because the omission is discoverd too late—is not rectified on that account. Hence, the incumbrancer suffers loss. Rentchargees whose charges, existing before the date of first registration have been overlooked, have

been paid £250, £23, and £33 with £28 costs. These figures represented such a sum as would, when invested in Government securities, produce the annual amount of the apportioned rentcharge together with all arrears. A second mortgagee claimed for the loss of his security through the omission of the Chief Land Registrar to enter it as an incumbrance when the title of the land in charge was first registered. £348 and £18 costs were paid (£391 claimed). In another case an unregistered lease had been noted against a registered freehold title. The notice of the lease was cancelled on the register when it was believed that the leasehold term had merged. In fact, there was a second mortgage of the lease which prevented merger at law but, seeing that the mortgagee lost his security when notice of the lease was removed from the title to the reversion, he was paid £42 and £6 costs.

9. The omission of restrictive covenants has also given rise to an indemnity claim. When a registered proprietor whose title had been registered free from covenants proposed entering upon certain building operations, a successor in title of the covenantee came forward to object. Eventually, the register was rectified with the consent of the proprietor by the entry of notice of the covenants and he was paid a sum representing the difference between the value of the land subject to the covenants and its worth as unencumbered building land.

10. A minor technical failure in the bankruptcy machinery described in section 61 of the Land Registration Act has twice led to payments out of the indemnity fund. In one case the trustee in bankruptcy claimed that a creditor's notice was not entered against the title of a debtor-proprietor who was thus entitled to sell free from notice of a bankruptcy petition. £144, and £5 costs, were paid out of the insurance fund in respect of the loss suffered by the creditors of the registered proprietor. The other claim arose where a bankruptcy inhibition was erroneously cancelled, thus enabling a bankrupt proprietor to sell his land before the receiving order had been rescinded or the proceedings had been annulled. £101 was paid (£367 claimed).

11. One of the most spectacular claims that has ever been made arose (where there had been no rectification of the registered title), out of the conviction for murder of John George Haigh who, it will be recalled, dissolved the bodies of a number of the victims of his avarice in a bath of acid. This notorious murderer killed a registered proprietor and, by means of a clever forgery, got himself registered as proprietor subject to an existing building society charge securing £2,500. Haigh then sold to an innocent purchaser for £4,000, repaying the building society £2,500 out of the proceeds.

The personal representative of the murdered proprietor then approached the Chief Land Registrar. Rectification of the register in his favour would have conflicted with the provisions of section 82 (3), because the innocent purchaser from Haigh was in possession. Hence the personal representative claimed, and was paid £4,000 less £2,500, namely, £1,500 (being the current value of the interest of which the deceased was deprived), with £78 costs.

Mention of forgery calls to mind the decision in *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, which authors of textbooks love to quote and argue about. In that case, which was brought under the old Land Transfer Act of 1897, a claim based on forgery failed. The present writer cannot help feeling that it is a pity that some authors still harp on the case because it has long since ceased to be the law and there is nothing in the official report that can now teach a principle that is applicable to the modern statute.

Circumstances excluding indemnity

No indemnity is payable to a claimant:—

1. If he has himself caused or substantially contributed to the loss by his fraud (section 83 (5) (a)).

2. If he derives title as a volunteer from a person committing fraud (*ibid.*).

3. For mines and mineral rights unless they are expressly included in his title (section 83 (5) (b)). The reason is, presumably, that they are not subject to compulsory registration (section 120 (1)).

4. Because a purchaser has acquired an interest under a registered disposition from a company free from any mortgage, charge, debenture, debenture stock, or trust deed (whether or not it has been registered under the Companies Acts) unless it is protected on the register of title (section 60).

5. Where a registered lease is disclaimed by the trustee in bankruptcy and an order is made by the court vesting the lease in any person (section 42 (2)).

6. For costs incurred in taking or defending any legal proceedings without the consent of the Chief Land Registrar (section 83 (5) (c)).

Procedure

The Land Registration Acts and Rules give scarcely any guidance about the methods of claiming indemnity. Seeing, however that indemnity for costs is barred to any claimant who is a party to proceedings without the consent of the Chief Land Registrar (section 83 (5) (c)), an initial application to him is the obvious

first course to be taken on all occasions, for he has power, if the applicant so wishes, to determine whether a right to indemnity has arisen and, if so, to award indemnity (section 83 (7)). When a claim is lodged, the Chief Land Registrar personally examines it and, if he is satisfied that it is a proper one, he advises the trustees of the fund that it ought to be met. In granting indemnity he may have regard to any costs and expenses properly incurred and may add them to the amount payable (section 83 (8)). A copy of his order is supplied to the claimant, to whom the trustees will pay the sums ordered. If the Chief Land Registrar decides to reject a claim for indemnity he will either inform the applicant of that fact, or make a formal order refusing indemnity.

On the other hand, the Chief Land Registrar may feel the desirability of having additional evidence or legal argument about the matter and so may decide to appoint a day for hearing the parties. Both the applicant and the Crown should be represented at the hearing. The insurance fund is under the control of its trustees (that is to say, the Accountant-General of the Supreme Court and the Comptroller-General, National Debt Office), and, therefore, they are necessary parties to any proceedings whether before the Chief Land Registrar or the court, and the Attorney-General should be added as a party on their behalf (*Att.-Gen.* v. *Odell* [1906] 2 Ch. 47).

The claimant or the Attorney-General, acting on behalf of the trustees, may appeal to the High Court from the Chief Land Registrar's decision, but the applicant will not be required to pay any costs except his own, even if unsuccessful, unless the court considers his appeal unreasonable (section 83 (7)). It seems that, to avoid possible loss of costs, the consent of the Chief Land Registrar should be obtained before an appeal is begun (*cf.* section 83 (5) (c)). He may himself refer the matter to the court at any stage (*w*). The procedure on appeal or reference is governed by R.S.C., Order 54D, rule 6. Original applications to the court are governed by Order 55, rule 14A (*x*).

The act of first registration has been likened to a contract of insurance, although it would be a mistake to press the analogy too far. There is nothing that strictly corresponds to the notion of an agreement *uberrimae fidei*. Yet the Chief Land Registrar is entitled to grant absolute title in reliance upon statements as to

(*w*) Land Registration Rules, 1925, r. 298.

(*x*) If an issue of fraud is to be raised the applicant's legal adviser should consider the desirability of framing his proceedings in a manner more appropriate to that issue (see Practice Note [1927] W.N. 12; *Re Leighton's Conveyance* [1936] 1 All E.R. 667).

title made by a solicitor (*y*) and, moreover, every application for first registration is required to be supported by a certificate as to his investigation of title signed by a practising solicitor. It is noteworthy that in making or refusing an order for rectification or indemnity the costs are in the discretion of the Chief Land Registrar (*z*) and, no doubt, he would be justified in mulcting a person who, by misleading him, had contributed to any mistake or omission. In any event, where indemnity is paid for a loss, the Chief Land Registrar is entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his fraud (section 83 (9)). He is also entitled to enforce any express or implied covenant or other right which the person who is indemnified would have been entitled to enforce in relation to the matter in respect of which indemnity has been paid (section 83 (10)).

(*y*) Land Registration Rules, 1925, rr. 29, 30.
(*z*) *Ibid.*, r. 321· and see s. 83 (8).

MORTGAGEE'S COSTS

By E. H. Bodkin, Barrister-at-Law

It has been settled law for nearly a century that a mortgagee is only entitled to costs as between party and party in proceedings for realising his security. The old rule was different, and allowed him costs as between solicitor and client. Mortgagees have apparently been content to accept the position, and no provisions giving them the right to indemnity costs seem to have found their way into the precedent books. Now, however, that litigation has become an expensive luxury it would seem reasonable, if such a course is practicable, for a mortgagee to protect himself fully against all possible costs which he may incur, and be certain of being repaid his advance with interest without being faced with meeting an uncertain bill for the expense of enforcing his rights.

An unsuccessful attempt to secure indemnity costs came before the courts recently in *Re Adelphi Hotel (Brighton) Ltd.* [1953] 2 All E.R. 498. There a bank had taken a mortgage on leaseholds and personal property containing a provision that "all costs, charges and expenses incurred or paid by it in relation to the negotiation for, and preparation, completion, realisation and enforcement of the security," should be included in the security.

In an action to enforce the security, it was ordered that the costs of the bank (including such costs, charges and expenses of the bank as mortgagee properly incurred by it) be taxed. The bank moved that the order be varied by substituting an order that the costs of and in connection with the action (including in such costs any costs, charges and expenses of the bank as mortgagee properly incurred by it) be taxed as between solicitor and own client.

Mr. Justice Vaisey dismissed the motion. After pointing out that the direction only gave the bank its so-called party and party costs, and that it had been argued that it should be indemnified against the whole of its costs and expenses, and that some at least of the items should be taxed, either on an indemnity basis, or, which came to much the same thing, as between solicitor and own client, or at any rate as between solicitor and client, his Lordship said that up to a point the position was free from doubt. In *The Kestrel* (1866) L.R. 1 A. & E. 78 it was laid down in clear terms that a mortgagee's costs in a mortgage suit would be taxed as between

party and party and not as between solicitor and client, that being said to accord with the established practice of the Court of Chancery. There was no doubt, therefore, as to the costs of the action. As regards the other costs, charges and expenses, it would be very strange if they were taxable on any different basis. In *Smith* v. *Buller* ((1875) L.R. 19 Eq. 473, at p. 475), it was said that "the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid for by the party incurring them." Where there was no litigation, his Lordship thought the definition applied as though it referred to transacting business as well as to conducting litigation. When costs were referred to they were understood to be party and party costs. A mortgagee was entitled to his "full costs," but that expression meant ordinary party and party costs. It was for the taxing master to say what the mortgagees were entitled to under the heading of costs, charges and expenses, conformably with the above principles.

The provision in the bank's mortgage, although wide and comprehensive words were used, covered only "full costs" in the above sense and did not give it a complete unqualified indemnity.

The order as drawn was sufficiently apt though he would himself have framed it slightly differently, *viz.*: "Let the costs of the plaintiff of this action together with any other costs, charges and expenses, properly incurred by the bank as mortgagee be taxed." There was no necessity to refer to party and party costs.

His Lordship did not, in the view which he took in the above case, have to consider the validity of a provision giving a mortgagee indemnity costs; but his judgment contains nothing to show that he considered it would be invalid. In ordinary cases there is nothing inherently unconscionable in allowing a mortgagee indemnity costs; under the old practice they were allowed solicitor and client costs without special stipulation, *Longman* v. *Hyde*, 2 Vern. 185. It is well established that a mortgagee can stipulate for a benefit over and above his ordinary rights, such as a bonus or commission for collecting the rents while in possession; and these will be allowed in account against the mortgagor.

The mortgagee's right to costs is "substantially a matter of contract," though the mortgagor is not personally liable for them and they are only imposed as a condition of redemption: *Cotterell* v. *Stratton* (1872) L.R. 8 Ch. 295; *Re Wallis, ex p. Lickorish* (1890) 25 Q.B.D. 176; *Re Sneyd* (1883) 25 Ch.D. 338, at p. 352.

This applies equally to costs in litigation and, inasmuch as the mortgagee can validly stipulate for additional costs in non-litigious

matters, there appears to be no reason why he should not do so in litigious matters. The general practice, apart from agreement, is to award costs as between party and party. But if only these are awarded as costs of the action, the extra could be recovered under the heading of other costs, charges and expenses. This could apparently be done under the ordinary form of order. It would be a simple matter so to allow the extra items on the solicitor's bill, so as to give the mortgagee full indemnity This is precisely what was done in *Ramsden* v. *Langley* (1705) 2 Vern. 536; though there the costs were incurred in defending proceedings by the mortgagor to set aside the mortgage prior to redemption and were allowed under the general principle applicable to such proceedings, and not under an agreement. It may be objected that this would be a roundabout way of effecting the intention, as taxation would in effect be made on both scales and the simplest way of working out the agreement would be by ordering taxation as between solicitor and own client. But this does not render the agreement invalid as fettering the court's discretion as to the scale of costs to be awarded.

In the *Conveyancer's Notebook* (Vol. 17, No. 5), the learned editor has expressed the view that the court's discretion to refuse the mortgagee his costs when he has been guilty of improper conduct cannot be ousted, and the litigants cannot agree in relation to proceedings generally that the costs shall fall upon one of the parties, to be taxed on a certain scale, in any event; though there are cases where it would be proper to make such an agreement with regard to specific proceedings about to be instituted. The further point is taken that, assuming the agreement would be valid, it would be oppressive. An unfortunate mortgagor should not be made to pay for any luxurious expenditure by the mortgagee.

These are weighty arguments; but with the greatest respect, it is submitted that the conclusion is not justified.

The court's discretion as to costs where the mortgagee has misconducted himself does not appear to differ from its discretion to refuse costs in any other action. An indemnity against the costs of future litigation generally is (apart from questions of maintenance, which obviously does not arise) valid: *British Cash, etc., Conveyors, Ltd.* v. *Lampson's Store Service Company, Ltd.* [1908] 1 K.B. 1008. Such an agreement does not operate to pervert or fetter the course of justice, whether or not the litigation or the conduct of the indemnified party is proper. The court is free to make any order it thinks fit, though as between the parties to the indemnity that order will be nullified.

A contract is valid and enforceable unless it offends against one of the recognised principles of the law of contract. To hold an

agreement such as we have been considering invalid would be to give too free rein to that "unruly horse," public policy.

As against the argument of unconscionableness, it must be remembered that proceedings against the mortgagor to enforce the security can only be brought when he has already been guilty of default in payment of principal or interest in accordance with the contract or some breach of the provisions in the mortgage. The view which equity takes of such questions has changed in modern times and where the parties are at arm's length the tendency is now to enforce all reasonable agreements between mortgagor and mortgagee: *cf. Knightsbridge Estates Trust Ltd.* v. *Byrne* [1940] A.C. 613. The position would of course be different where there was a suspicion or presumption of undue influence or the mortgagor was in a position to be imposed upon.

The validity of such an agreement is admittedly in doubt until the point has been judicially determined, but it seems worth while to insert a provision to this effect in mortgage deeds. It can do no harm, as it will not affect the validity of the mortgage, and if held invalid will only enable the mortgagor to redeem without reference to the additional costs. If the provision is limited to cases where the mortgagee is not refused his costs, or in other words to the difference between party and party and solicitor and own client costs when awarded, there would seem to be no ground on which it could be held invalid.

The clause can be framed so as to cover the mortgagee's costs in litigation properly brought by him against third parties, or by third parties against him. But it would be unwise and unfair to attempt to include the costs of other parties which he may have to pay. Ordinarily a mortgagee is not entitled to the costs of proceedings brought by or against persons other than the mortgagor. But he can recover solicitor and client costs in an action against the mortgagor or his successors in title to defend his title to the mortgage. And there is an exception where the mortgagee has been put to expense in defending the mortgagor's title to the property: *Re Leighton's Conveyance* [1937] Ch. 149. But if some litigious person who cannot pay the costs brings an action to contest the mortgagee's title to the mortgage, it has been said to be the mortgagee's misfortune and he cannot charge the costs against the mortgagor. The distinction is clearly shown in the rather intriguing case of *Owen* v. *Crouch* (1857) 5 W.R. 545. There the mortgagee found the mortgaged premises in the occupation of two families who had been put in by a neighbour, one Millikin, described as a man of violent and unscrupulous character. The mortgagee succeeded in turning out the trespassers, but was

himself ejected by Millikin and twenty other Irishmen. He was allowed the costs of an action of ejectment against them, but not those of defending an action of trespass recklessly brought against him by Millikin.

The same principles apply to deducting the costs from the proceeds of sale of the property. In *Re Smith's Mortgage* [1931] 2 Ch. 168, the mortgagee had put up the property for sale. The mortgagor attended the auction and bid for it. She alleged that she was the highest bidder, but the property was knocked down to another bidder. She brought an action for specific performance against the mortgagee and the purchaser, but failed, and was unable to pay the mortgagee's costs. It was held that as the dispute did not touch the title to the estate, the mortgagee could not deduct the costs from the proceeds of sale under section 105 of the Law of Property Act, 1925, as they were not " costs, charges and expenses " properly incident to the sale within that section.

THE LAW OF RATING

PART II

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Exemptions from Liability to Rates

Although there may be beneficial occupation of land, the occupier may yet not be liable to be rated. There are numerous possible grounds of exemption, some of which may be peculiar to the particular occupier. With such special exemptions this work is not concerned (*a*). It is only proposed to consider the following general exemptions :

(A) The exemption of the Crown
(B) Places of Public Worship : Voluntary Schools
(C) Scientific and Literary Societies
(D) Agricultural Land and Buildings
(E) Nationalised Industries

(A) *The Crown*

The Crown is not mentioned in the Poor Relief Act, 1601 (43 Eliz. c. 2), and according to the general principles which govern the construction of statutes is not therefore bound by it. No attempt has been made in subsequent rating legislation to bind the Crown, with the result that the Crown is not liable to pay rates in respect of the land which it occupies.

Such exemption applies not only to land which is occupied by the sovereign in person, but also to land which is occupied by the Crown in the exercise of the executive functions of government. In the latter case the occupation of the Crown is necessarily by its servants. As has already been stated (*ante*, p. 56), the occupation of a servant is to be regarded as the occupation of the master only if the servant is in occupation the better to discharge his duties to his master. Thus where a servant of the Crown occupies land for his own benefit, then even although the land be the property of the Crown, he personally will be rateable and the fact that he

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(*a*) *e.g.*, Exemptions under the Burial Act, 1855, Highways Act, 1835, and The Rating and Valuation (Air-Raid Works) Act, 1938.

happens to be a servant of the Crown will confer no immunity upon him (*b*).

The general rule was stated by Lord Cairns in *Greig* v. *University of Edinburgh* (1868) L.R. 1 H.L.Sc. 348, at p. 350 : " The Crown not being named in the English or Scotch statutes on the subject of assessment and not being bound by statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown, is not rateable. . . ."

It is clear, however, that the exemption from rating which the Crown enjoys extends to a number of persons who are not servants of the Crown at all, but who occupy land in the discharge of some public duty. Prior to the decision of the House of Lords in *Jones* v. *Mersey Docks* (1865) 11 H.L.C. 443, an exemption from rating was commonly conferred wherever land was occupied " for public purposes " whether or not those purposes were the purposes of the Crown. The ground of such decisions was frequently that the persons sought to be rated had no personal benefit from the land occupied and were not therefore in beneficial occupation (*c*). The decision in *Jones* v. *Mersey Docks* not only sought to define the true nature of beneficial occupation (*d*), but also established that there was no general exemption from rates for land occupied " for public purposes," but that the exemption was confined to land occupied by the Crown or exclusively for the purposes of the Crown. " Where valuable property . . . is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country and are, therefore, to be deemed part of the use and service of the Crown " : *per* Lord Westbury, p. 504. All decisions prior to 1865 which gave exemption from rates can only now be upheld in so far as they accord with this test.

In *Tunnicliffe* v. *Overseers of Birkdale* (1888) 20 Q.B.D. 450, Lord Esher M.R. expressed the view that in *Jones* v. *Mersey Docks* the House of Lords had confined the exemption to those cases " where if anyone were to be rated for the premises, it would be the Crown " (*e*), although he conceded that there might be certain exceptions to this rule which were attributable to the reluctance of the courts to disturb " a long series of decisions or a long course of practice adopted in reliance on a legal decision. . . ." (*f*). It

(*b*) *e.g.*, *R.* v. *Ponsonby* (1842) 3 Q.B. 14: the occupier was not a servant but the principle is the same.
(*c*) *e.g.*, *R.* v. *Worcestershire JJ.* (1839) 11 A. & E. 57.
(*d*) See *ante*, pp. 57 *et seq.*
(*e*) p. 454.
(*f*) *Ibid.*, p. 453.

seems clear, however, that this rule is too narrow and that the exemption does apply in certain cases where it cannot be said that those in occupation are the servants of the Crown. In *Jones* v. *Mersey Docks* Blackburn J. expressly approved a number of earlier decisions (*g*) of which he said : ". . . it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty : but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the sovereign : so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in *consimili casu* " (*h*). Further the House of Lords in the later case of *Coomber* v. *Berkshire JJ.* (1883) 9 App.Cas. 61 expressly decided that no income tax was payable in respect of buildings erected by the county justices under statutory powers to serve as assize courts and as a police station and that for this purpose no distinction was to be drawn between liability to income tax and liability to be rated (*i*). The ground of the decision was that ". . . the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by . . . [the] police are among the most important functions of Government . . . [and] that by the constitution these functions do, of common right, belong to the Crown " (*j*). Accordingly the buildings enjoyed the exemption of the Crown, although it could not be said that the persons in whom the buildings were vested were strictly servants of the Crown.

It would appear from the above that because the Crown is not bound by rating legislation, no rates can be levied in the following cases :

(i) where land is occupied by the Sovereign in person;

(ii) where land is occupied by servants of the Crown in the discharge of their duties as servants;

(iii) where land is occupied by persons who, although not servants of the Crown, occupy the land exclusively for those purposes which are to be regarded as the purposes of the Crown.

(i) *Land occupied by the Sovereign*

Little need be said about such land, which includes, of course, all the royal palaces. It should always be remembered, however,

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(*g*) *Lancashire JJ.* v. *Stretford*, E.B. & E. 225; *Hodgson* v. *Local Board of Carlisle*, 8 E. & B. 116; *R.* v. *Manchester*, 3 E. & B. 336; *R.* v. *Shepherd*, 1 Q.B. 170.

(*h*) (1865) 11 H.L.C. 443, at p. 464.

(*i*) p. 71.

(*j*) *Per* Lord Blackburn, at p. 67.

that the exemption from rating is dependent upon the occupation by the Crown and not upon the ownership of the Crown. Thus in *R.* v. *Ponsonby* (1842) 3 Q.B. 14, the occupant of a "grace and favour" apartment at Hampton Court was held rateable, despite the fact that Hampton Court was a royal palace.

(ii) *Land occupied by Servants of the Crown*

Government Departments are not rateable for the lands which they occupy, although it is commonly the practice for them to make a voluntary contribution in aid of the rates in respect of such lands. This practice is recognised by the Rating and Valuation Act, 1925, s. 64 (3), of which provides that "where any hereditament is occupied by or on behalf of the Crown for public purposes—(a) no gross value shall be determined or entered in the valuation list . . . and (b) if any contribution is made by the Crown in aid of rates in respect of that hereditament, there shall be entered in the valuation list as representing the rateable value thereof the value upon which that contribution is computed. . . ." In *Williams* v. *Neath Assessment Committee* (1935) 154 L.T. 261, this section was treated by Goddard and Singleton JJ. as if it conferred some exemption. It seems clear, however, that the exemption of the Crown from rates is not dependent upon the section which is concerned only to provide what shall be done where the Crown of grace makes a contribution in aid of the rates (*k*).

The Armed Forces

It has long been established that land which is occupied by the regular armed forces of the Crown cannot be rated (*l*). Nor apparently can land occupied by a N.A.A.F.I. Institute (*m*). In *R.* v. *Kneller Hall Trustee* (1858) 31 L.T.(o.s.) 212, land which was held by trustees for the Secretary of War for such purposes as Her Majesty in council might direct, was used as a school for military bands. The bandsmen resided on the premises as did their civilian masters, who were permitted to take private civilian pupils living elsewhere. The school was supported by the contributions of serving officers. In these circumstances the trustees were held rateable. The court followed an earlier decision of *R.* v. *Temple* (1853) 2 E. & B. 160, which related to the same premises when they had been used as a normal and model school and was

(*k*) See also *Derby (Territorial Army Association)* v. *South East Derby Assessment Committee* [1935] 2 K.B. 373.

(*l*) *Lord Amherst* v. *Lord Sommers* (1788) 2 T.R. 372 (stables rented by colonel of regiment for use of regiment): *R.* v. *Stewart* (1857) 8 E. & B. 360 (admiralty).

(*m*) *N.A.A.F.I.* v. *Wiltshire County Valuation Committee* (1943) 36 Rating and Income Tax 70.

much influenced by the fact that the masters took private pupils. It is difficult, however, to see what difference this fact made or why the trustees should not have been exempted as persons using the premises for the purposes of the Crown.

Premises used by the volunteer corps (*n*) and by the territorial army (*o*) have been held not to be rateable. It has also been held that such exemption extends to residences of non-commissioned officers attached to the Territorial Army, where they occupy such residences for the discharge of their duties (*p*). In *Lewis* v. *Durham Union* (1904) 90 L.T. 383, premises were used as a drill hall and store-house for a volunteer battalion. Certain rooms were, however, occasionally let for concerts and dances and it was held that these rooms were rateable and that where premises are only constructively in the occupation of the Crown, they must be exclusively used for the purposes of the Crown if exemption is to be claimed (*r*).

Post Offices

Land which is occupied for the purposes of the post office is in general entitled to exemption just as is land occupied by any other Government Department (*s*). The General Post Office Extension Act, 1865, the Post Office (Sites) Act, 1885 and the Telegraph Act, 1868, however, imposed certain liabilities for rates upon the Postmaster-General in respect of land acquired under those Acts : under the Act of 1868 the liability is limited to the rateable value of the lands at the time of their acquisition by the Postmaster-General.

Premises which are used as a sub-post office are rated in the usual way. In *Williams* v. *Neath Assessment Committee* (1935) 154 L.T. 261, it was held that a sub-postmaster is in the position of an independent contractor who undertakes to execute certain post office business upon his own premises and that he is not to be regarded as a servant of the Crown, nor as occupying for the purposes of the Crown.

(iii) *Land occupied for the purposes of the Crown*

It is established that the administration of justice and the maintenance of law and order are purposes of the Crown and accordingly that courts of justice, prisons and police stations are

(*n*) *Pearson* v. *Holborn Union Assessment Committee* [1893] 1 Q.B. 389.
(*o*) *Wixon* v. *Thomas* [1911] 1 K.B. 43.
(*p*) *Wixon* v. *Thomas* (No. 2) [1912] 1 K.B. 690.
(*r*) Volunteer Act, 1863, s. 26, gave an express exemption from rating to volunteer storehouses, but it was decided in *Pearson* v. *Holborn Union Assessment Committee* (*supra*), that the exemption was not limited to such volunteer premises. See also *Rayner* v. *Drewitt* (1900) 82 L.T. 718.
(*s*) *Smith* v. *Birmingham* (*Guardians*) (1857) 7 E. & B. 483.

not in general to be rated. Premises which are used for the purposes of local government are not occupied for the purposes of the Crown and are therefore liable to be rated in the usual way.

Courts of Justice

As has already been noted in *Coomber* v. *Berkshire JJ.* (1883) 9 App.Cas. 61, buildings erected as assize courts and police stations were held by implication to be exempt from the provisions of rating statutes also. It was objected by the appellants that the provision of a county police station was a purpose of local government and not of the Crown. Lord Blackburn, however, disposed of the objection by saying : " The general Government administers law and justice, and keeps order : but it necessarily does it in different localities separately. If Berkshire . . . were suffered to get into lawless anarchy, every part of the empire would suffer . . . It is a purpose of the imperial Government, carried out in a particular locality, but not the less a purpose of the imperial Government " (*t*). In *Nicholson* v. *Holborn Union Assessment Committee* (1886) 18 Q.B.D. 161, the rateability of the Middlesex sessions house was considered. The sessions house had been erected under an Act of 1777 (*u*) which provided that it was not to be rated at a higher figure than the assessment of the site at the date of the Act. The sessions house was used for the discharge by the justices of their judicial and administrative functions. It was held that notwithstanding the Act of 1777 the premises were wholly exempt from rates as being premises used exclusively for the purposes of the Crown.

After the passing of the Local Government Act, 1888, the administrative functions of the county justices were reduced and it was thereafter suggested that only in the exercise of their judicial functions were the justices acting for the purposes of the Crown. In the case of *Middlesex County Council* v. *St. George's Union* [1897] 1 Q.B. 64, it was held that premises occupied by a county council for administrative purposes were not exempt from rating. Parts of the Guildhall, Westminster, were used exclusively by the county council, parts were used by the council jointly with the justices and the remaining parts were used exclusively by the justices for quarter sessions. Lord Esher M.R. said (*v*) : " I should be disposed to say that . . . in a case where premises were occupied by the justices for judicial purposes, and separate premises were occupied by them for the administrative business of the county only, the

(*t*) At p. 71.
(*u*) 18 Geo. 3, c. 67.
(*v*) At p. 69.

latter would have been rateable . . . with regard to that part of the building which is used by the county council and also by the justices, if the justices had used that part for judicial purposes, another question might have arisen. . . . It appears that that part of the building is used by the justices jointly with the county council, not for judicial, but administrative purposes, which would not come within the definition of Crown purposes . . . under those circumstances, the fact of it being so used cannot prevent the county council . . . from being rateable in respect of it." In the same year the Court of Appeal in *Worcestershire County Council* v. *Worcester Union* [1897] 1 Q.B. 480, decided that where premises were used both by the county council and by the justices in the exercise of their judicial functions, the county council was rateable in respect of them, not to their full value, but to the extent to which the council used them (*w*).

Police Stations

In general premises occupied by the police for the discharge of their duties are exempt from rating (*x*). There are, however, a number of decisions as to the rateability of residences provided for police officers. These cases illustrate the rule already considered (*y*) that the servant is personally rateable if his occupation is for his own benefit and not for the better discharge of his duties.

It is clear that premises which are occupied for police purposes do not lose their exemption because they consist in part of accommodation for the resident chief constable and his family : *Leicester County Council* v. *Leicester Parish Assessment Committee* (1898) 78 L.T. 463. So also where three dwelling-houses were provided within the boundary of the police station for police officers who were attached to the station and had frequent duties to perform there, the officers were held not to be rateable, although deductions were made from their salaries for their use and occupation of the houses : *Cross* v. *West Derby Union Assessment Committee* (1899) 81 L.T. 645. In *Showers* v. *Chelmsford Union Assessment Committee* [1891] 1 Q.B. 339, however, it was held that the chief constable and other officers were rateable in respect of the residences which they occupied adjacent to police premises, comprising store-rooms and stables. Cells for the reception of prisoners were about a mile distant. The chief constable was required to reside in a house on the premises as a condition of his appointment. The

(*w*) The premises were the same as those in *R.* v. *Worcestershire JJ.* (1839) 11 A. & E. 57: they vested in the county council on the passing of the Local Government Act, 1888.

(*x*) See *R.* v. *St. Martins', Leicester* (1867) L.R. 2 Q.B. 493.

(*y*) *Ante*, p. 56.

mere fact, however, that an officer is required to reside in a particular house does not exempt him from rates if he has no duties to perform there or near at hand (*z*).

Prisons

It is not doubted that prisons in the strict sense are exempt from rating. There is, however, some confusion on the authorities as to the position of reformatories and industrial schools. In *R.* v. *West Derby* (1875) L.R. 10 Q.B. 283 and in *Tunnicliffe* v. *Overseers of Birkdale* (1888) 20 Q.B.D. 450 an industrial school and a reformatory school certified under the Reformatory Schools Act, 1866, were respectively held to be rateable. In both cases the establishment was partly supported by voluntary contributions, and in *Tunnicliffe's* case the committee of management was not bound to accept children presented for reception by the Crown (*a*). The absence of voluntary contributions was held to be immaterial, however, in *Durham County Council* v. *Chester-le-Street* [1891] 1 Q.B. 330, a case in which an industrial school managed by the county council and partly maintained by Government grant and out of the county rate was held rateable. A place of detention established by the London County Council, as police authority for the County of London, under the Children Act, 1908, has been held exempt from rating: *London County Council* v. *Camberwell Borough Council* (1910) Konst. & W.Rat.App. 44. This decision would appear to be more in accordance with the principle established in *Coomber* v. *Berkshire JJ.* (1883) 9 App.Cas. 61.

(B) *Places of Public Worship: Voluntary Schools*

The Poor Rate Exemption Act, 1833, provides by section 1:

> "No person . . . shall be rated . . . for or in respect of any churches, district churches, chapels, meeting houses, or premises, or such part thereof as shall be exclusively appropriated to public religious worship and which (other than churches, district churches, and episcopal chapels of the Established Church) shall be duly certified for the performance of such religious worship. . . .
>
> Provided always, that no person . . . shall be hereby exempted from any such rates . . . in respect of any parts of such churches, district churches, chapels, meeting houses, or other premises which are not so exclusively appropriated,

(*z*) *R.* v. *Bridgehouse* (1869) 20 L.T. 658. See also *Martin* v. *West Derby Assessment Committee* (1883) 11 Q.B.D. 145; *Macharg* v. *Stoke-upon-Trent Assessment Committee* (1884) 48 J.P. 775, D.C.; *Monmouth Overseers* v. *Monmouthshire County Council* (1902) 87 L.T. 65.

(*a*) *Per* Fry L.J., at p. 458.

and from which parts not so exclusively appropriated such person . . . shall receive any rent . . . or shall derive profit or advantage."

A number of difficulties of construction present themselves. It has been held, however, that " on its true construction the section would appear to relate to 'churches, district churches, chapels, meeting houses, or premises which shall be exclusively appropriated to public religious worship, or such parts thereof as shall be so appropriated,'" *per* Birkett L.J. in *Rogers* v. *Lewisham Borough Council* [1951] 2 All E.R. 718 at p. 721. If this be the correct construction of the main part of the section, then it is difficult to see how the proviso can ever apply. The proviso only purports to withdraw the exemption conferred by the section if, firstly, the parts in question are not exclusively appropriated to public religious worship and, secondly, rent, profit or advantage is derived therefrom. Unless, however, the premises are so exclusively appropriated, the section does not apply at all : where premises are exclusively appropriated to public religious worship the fact that a profit is made thereby does not defeat the exemption. " The proviso presents great difficulty in its construction, and it is not easy to give any meaning, or any sensible meaning, to it, when the purpose of the section itself is kept in mind " (*b*).

Exclusive Appropriation

It is quite clear from the decided cases that full effect must be given to the word " exclusively." In *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee* (1930) 46 T.L.R. 633 a portion of a Roman Catholic Church near the altar had been " blessed," but the remainder of the building had not. The unblessed portion was used periodically for dances, although when religious services were held in the church both the " blessed " and " unblessed " portions were used together. In these circumstances, although the whole church had been certified for the performance of religious worship, it was held that the unblessed portion of the church was liable to be rated. So, also, where four rooms attached to a gospel hall were used on Sundays for children's services, but were also used for educational and recreational activities during the week, it was held that they were not within section 1 of the Poor Rate Exemption Act, 1833: *Rogers* v. *Lewisham Borough Council* [1951] 2 All E.R. 719 (*c*). Uses which

(*b*) *Per* Birkett L.J. *Rogers* v. *Lewisham Borough Council* [1951] 2 All E.R. 718, at p. 721.

(*c*) See also *Charrington* v. *Mile End Old Town Hamlet* (1891) Ryde Rat.App. (1891–3) 14.

are incidental merely to the overriding religious use will not prevent the exemption from being enjoyed, but a use can only be regarded as incidental if "it is either reasonably necessary to enable the premises to be used for public religious worship or [is] an activity of a kind customarily regarded as appropriate to be carried on in a place of public religious worship, though not itself a religious service" (*d*). Comparison may be made with the less stringent provisions of the Places of Worship (Enfranchisement) Act, 1920, considered in *Stradling* v. *Higgens* [1932] 1 Ch. 143.

Public Worship

If the premises are to enjoy exemption the religious worship must be public. Thus it has been held that collegiate and school chapels are liable to be rated (*e*).

Premises

It has also been held in *North Manchester Overseers* v. *Winstanley* [1908] 1 K.B. 835 that the word "premises" in section 1 of the Act of 1833 is to be construed *ejusdem generis* with churches, chapels and meeting houses, and does not include a churchyard.

Sunday Schools

Section 2 of the Act of 1833 provides :

> ". . . No person . . . shall be liable to any such rates . . . because the said churches, district churches, chapels, meeting houses, or other premises or any vestry room belonging thereto, or any part thereof may be used for Sunday or infant schools, or for the charitable education of the poor."

There is no definition in the Act of 1833 of "Sunday Schools," but the term is defined by the Ragged Schools (Exemption from Rating) Act, 1869, to mean "any school used for giving religious education gratuitously to children and young persons on Sunday, and on weekdays for the holding of classes and meetings in furtherance of the same object, and without pecuniary profit being derived therefrom" (*f*). By applying this definition to the expression as used in the Act of 1833, the court held in *Rogers* v. *Lewisham Borough Council* [1951] 2 All E.R. 718 that the four rooms

(*d*) *Rogers* case, *supra*, at p. 722. The court expressed the view that "an occasional oratorio, organ recital, carol concert, or mystery play," would not disqualify premises from exemption.

(*e*) *Oxford Park Case* (1857) 8 E. & B. 184, at p. 211; *Royal Medical Benevolent College* v. *Epsom Union* (1902) Ryde & Konst.Rat.App. 82.

(*f*) s. 2.

attached to the gospel hall were exempt from rating by virtue of section 2 of the Act.

It should also be noted that the Act of 1869 confers a discretion upon rating authorities to exempt from rating buildings which are used exclusively as a Sunday School or Ragged School as therein defined (*g*).

Voluntary Schools

It is provided by section 64 of the Education Act, 1944, that

> "No person shall be liable to pay, in respect of the school premises of any voluntary school, any rate the proceeds of which are applicable to public local purposes . . . being a rate leviable on the basis of an assessment in respect of the yearly value of property." The expression "voluntary school" means primary and secondary schools which are not established by a local education authority or former authority (*h*).

(C) *Scientific and Literary Societies*

The Scientific Societies Act, 1843, s. 1, provides:

> "No person . . . shall be assessed or rated . . . in respect of any land, houses or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature or the fine arts exclusively, either as tenant or owner and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law . . . [appointed to certify the rules of friendly societies]."

If a society is to be entitled to exemption under this Act all the following conditions must be satisfied:

(1) The society must be instituted for the purposes of science, literature or the fine arts.
(2) Such purposes must be the only purposes of the society.
(3) The society must occupy premises belonging to it as tenant or owner for the transaction of its business.
(4) The society must be supported wholly or in part by annual voluntary contributions.

(*g*) s. 1: see also *Bell* v. *Crane* (1873) L.R. 8 Q.B. 481.
(*h*) s. 9 (2) of the Act. For the definition of the terms "primary school," "secondary school," "local authority," "former authority" and "school premises," see s. 114 and s. 8 (1) of the Act.

(5) The laws of the society must prohibit the making of any dividend or payment in money to its members.

(6) The society must obtain the certificate of the barrister-at-law.

Each of these six requirements will now be considered in turn.

(1) *Purposes of Science, Literature and the Fine Arts*

The expression " science " is not confined to pure science, but, includes the applied sciences also. " The expression plainly includes applied science, and it was intended, I think, to denote a particular branch of science, as well as universal science or science generally " : *per* Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (1890) 15 App.Cas. 334, at p. 353. Thus the Institute of Civil Engineers (*i*) has been held to be a scientific society as have, *inter alia*, the Linnean Society (*j*), the British Non-Ferrous Metals Research Association (*k*), the British Iron and Steel Research Association (*l*) and the British Launderers Research Association (*m*).

The London Library (*n*) and the Bradford Library and Literary Society (*o*) both of which provided books and periodicals for the use of their members have been held to be literary societies, entitled to the exemptions of the Act. It is doubtful, however, in the light of later authority if these cases were correctly decided. By contrast it was held in *R.* v. *Jones* (1846) 8 Q.B.D. 719, that the Religious Trust Society is not a literary society, but a religious society which furthers its purposes by literary means.

The " fine arts " were held in *Royal College of Music* v. *Westminster Vestry* [1898] 1 Q.B. 809 to include music. The expression would also presumably include societies instituted to promote painting, sculpture and architecture.

(2) " *Exclusively* "

" It is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purposes of promoting science, literature or the fine arts. One or other of them must be its exclusive object : so that an institution which also contemplated some other though altogether subsidiary object

(*i*) *R.* v. *Institute of Civil Engineers* (1879) 5 Q.B.D. 48; *Commissioners of Inland Revenue* v. *Forrest* (1890) 15 App.Cas. 334.

(*j*) *St. Anne* v. *Linnean Society* (1854) 3 E. & B. 793.

(*k*) *British Non-Ferrous Metals Research Association* v. *St. Pancras* (1932) 16 R. & I.T. 136.

(*l*) *Battersea Metropolitan Borough* v. *British Iron & Steel Research Association* [1949] 1 K.B. 434.

(*m*) *British Launderers Research Association* v. *Hendon Borough R. A.* [1949] 1 K.B. 434, 462. In some of these cases the societies failed on other grounds.

(*n*) *Clarendon* v. *St. James* (1851) 10 C.B. 806.

(*o*) *Bradford Library Society* v. *Bradford* (1858) 1 E. & E. 88.

could not claim the benefit of the exemption" : *per* Lord Watson in *Commissioners of Inland Revenue* v. *Forrest* (1890) 15 App.Cas. 334, at p. 348. In order to determine whether or not a society is instituted exclusively for the purposes specified in the Act of 1843 it is necessary to look at its rules, or memorandum of association, if it has one. If the purposes of the society as there stated are wider than those specified in the Act, the society will not be entitled to exemption even though in fact it only pursues purposes which are within the Act (*p*). On the other hand, however, a society will not be entitled to exemption if its declared purposes are within the Act, but it in fact pursues purposes which are wider than those of the Act (*q*). "If, however, there is no memorandum of association, or if the memorandum is not clear on the point . . . then regard may properly be had to the purposes which the society has in fact pursued" (*r*).

It is obvious, however, that certain ancillary activities which are not in themselves scientific or literary and do not relate to the fine arts must be pursued by a society if it is to pursue the purposes for which it was instituted. The rule relating to such ancillary activities was stated by Denning L.J. in *The British Launderers* case as follows (*s*): ". . . other purposes which are merely incidental to the purposes of science, literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once, however, the other purposes cease to be merely incidental, but become collateral : . . . that is become additional purposes of the society: then whether they be main or subsidiary . . . the society cannot claim the exemption" (*t*).

These principles are well illustrated by the *British Iron and Steel Research Association* case (*u*). The association had as its primary object the promotion of research and scientific work for the iron and steel industry, but it also had as objects *inter alia* the execution of "all kinds of technical work" and the encouragement and improvement of "the technical education of persons who are likely to be engaged in the . . . [iron and steel] industries." The association was also empowered to acquire patents or licences relating to inventions. It was held by the Court of Appeal that "technical work" and "technical education" might

(*p*) See *Battersea Metropolitan Borough* v. *British Iron and Steel Research Association* [1949] 1 K.B. 434 at p. 451.
(*q*) *Ibid.*, p. 451.
(*r*) *Per* Denning L.J., *British Launderers Research Association* v. *Hendon Borough R. A.* [1949] 1 K.B. 434, 462, at p. 470.
(*s*) [1949] 1 K.B. 434, 462 at p. 467.
(*t*) See also Jenkins J. [1949] 1 K.B. 434 at p. 453.
(*u*) [1949] 1 K.B. 434.

well include work and education which were not scientific, and that the power to acquire patents and licences was not a scientific purpose, but showed that the association had as its object not only the promotion of science, but also the promotion of the interest of its members. Accordingly the association was not entitled to the exemption of the Act. So long, however, as the benefit which members of a society receive are primarily intellectual the society will not lose exemption upon the ground that some of its purposes are the purposes of its members. In the *British Iron and Steel Research Association* case, however, the members of the association derived more than mere intellectual advantage from their membership (*uu*).

So, also, in *School of Oriental and African Studies* v. *Westminster City R. A.* [1940] 2 All E.R. 531, the school which was incorporated by royal charter "to further research in, and to extend the study and knowledge of, Eastern and African peoples, ancient and modern, and the literature, history, religion, law, customs and art of those peoples . . ." failed to obtain exemption because it was also empowered to provide "courses suitable to the needs of persons about to proceed to the East or to Africa . . . for the public services or commerce, or for the pursuit of a profession or other calling. . . ."

(3) *Occupation for the Transaction of Business*

Once it is established that the society is instituted exclusively for the purposes of science, literature or the fine arts, it will usually follow that the society uses the premises which it alone occupies for the transaction of its business. If, however, the society sublets part of its premises, and the parts sublet are not separately rated, the society is not entitled to exemption (*v*). But the mere fact that the society lends its premises without charge on one occasion, does not show that the premises are not being used for the transaction of the society's business and, therefore, will not disentitle the society to exemption (*w*).

The wording of the section requires not only that the society should occupy the premises in question, but also that it should have some title to them either "as tenant or owner." It would appear, therefore, that there might be circumstances in which a society, having a mere licence to use premises, might have a sufficient occupation to render it liable to be rated and yet would be unable to claim the exemption of the Act.

(*uu*) See *R.* v. *Brendt* (1851) 16 Q.B. 462. The prospect of further advantages may also show that members' contributions are not voluntary: see *infra*, p. 168.
(*v*) *Purvis* v. *Traill* (1849) 3 Ex 344.
(*w*) *R.* v. *Brandt* (1851) 16 Q.B. 462, 471.

(4) *Voluntary Contributions*

". . . In order to qualify as a voluntary contribution . . . a contribution must in substance be charitable or altruistic in character,—a payment made in support of the society for the sake of the public utility of its purposes, as opposed to a payment comparable to the subscription made by a member of a club for the sake of the private advantage of membership. This does not, however, mean that a subscription is prevented from being a voluntary contribution merely because it carries with it membership of the society and certain incidental advantages are conferred by membership. The substance of each case must be looked at to see whether the payments claimed to be voluntary contributions are in substance made as a matter of business or as a matter of bounty" (*x*). It is established by the *British Iron and Steel Association* case that a government grant does not rank as a voluntary contribution : "it is . . . the very antithesis of a voluntary contribution" (*y*). Prior to this decision there was a line of authority stemming from *Royal College of Music* v. *Westminster Vestry* [1898] 1 Q.B. 304 to the contrary. In the latter case Hawkins J. had included a government grant in the total amount of voluntary contributions and this was taken in *Hornsey School of Art* v. *Edmonton Union*, 70 J.P. 121, and in *Westminster City Council* v. *Royal United Service Institution* [1938] 2 All E.R. 545 to have decided that government grants ranked as voluntary contributions, despite the authority of *Overseers of Savoy* v. *Art Union of London* [1896] A.C. 296, 308 to the contrary. Authorities in favour of the view that a government grant is a voluntary contribution can no longer be regarded as good law.

It is not necessary that the society should be wholly supported by voluntary contributions, it is sufficient if it is so supported in part. The society must, however, be dependent upon voluntary contributions to more than a nominal extent. "A society is only 'supported in whole or in part by voluntary contributions' if it has to rely on them for the continuance of its work" (*z*). In the *British Iron and Steel Research Association* case it was held that a voluntary payment of £2,000 out of a total income of £99,474 was not sufficient to entitle the association to claim the benefit of the Act. By contrast in *Royal College of Music* v. *Westminster Vestry* [1898] 1 Q.B. 304, voluntary contributions of £1,632 (which included a government grant of £500) out of a total income of

(*x*) *Per* Jenkins J. *British Iron and Steel Research Association* case [1949] 1 K.B. 434, at p. 457: see also Denning L.J. at p. 472.
(*y*) *Ibid.*, p. 459.
(*z*) *Per* Denning L.J. *ibid.*, p. 462.

£18,780, were regarded as more than nominal and as sufficient to entitle the College to exemption (*zz*).

(5) *Prohibition against Dividends*

If a society is to be entitled to exemption under the Act, there must be an express rule against the payment of dividends. It is not sufficient that the rules are silent on this point and contain no power to make such payments : *R.* v. *Phillips* (1848) 8 Q.B. 745; *R.* v. *Jones* (1846) 8 Q.B. 719. The section does not, however, prohibit the division of assets among members of the society upon its being wound up (*a*), nor is it any objection that members of the society may sell their shares in the open market (*b*). Moreover, payments to members of the society for services rendered by them to the society do not involve any infringement of the Act (*c*).

(6) *Certificate of a Barrister*

The certificate of a barrister is a condition precedent to exemption, but it is not conclusive proof that the society satisfies the requirements of the Act : *R.* v. *Phillips* (1848) 8 Q.B. 745. Accordingly if there is no appeal against the award of a certificate and the society is nevertheless rated, it is for the society to show that it is in every respect within the Act.

(D) *Agricultural Land and Buildings*

Section 67 (1) of the Local Government Act, 1929, provides :

> " No person shall . . . be liable to pay rates in respect of any agricultural land or agricultural buildings or be deemed to be in occupation thereof for rating purposes and . . . no such land or building shall be included in any rate. . . ."

The definitions of " agricultural land " and " agricultural buildings " are to be found in section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928.

Agricultural Land

" ' Agricultural land ' means any land used as arable meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one quarter of an acre, market gardens, nursery

(*zz*) See also *Leighton House Committee* v. *Kensington Corporation* (1905) 1 Konst.Rat.App. 1.

(*a*) *Churchwardens of Birmingham* v. *Shaw* (1849) 10 Q.B. 868, 878.

(*b*) *Liverpool Library* v. *Mayor of Liverpool* (1860) 29 L.J.M.C. 221.

(*c*) *Royal College of Music* v. *Westminster Vestry* [1898] 1 Q.B. 304.

grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens (other than as aforesaid) pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course; and for the purpose of this definition the expression 'cottage garden' means a garden attached to a house occupied as a dwelling by a person of the labouring classes" (*d*).

By far the greatest amount of the land which is exempt from rating by virtue of these statutory provisions is exempt as "land used as arable meadow or pasture ground only" (*e*). Full effect must be given to the word "only" and if land which is used as arable, meadow or pasture ground is also put to some other though wholly subsidiary use, the occupier will not be entitled to exemption from rating, unless he can establish that the subsidiary use is so slight as to be within the principle *de minimis non curat lex*. Thus in *Meriden and Solihull R. A.* v. *Tyacke* [1950] 1 All E.R. 939, a farmer whose field was infested with parasites dangerous to young cattle, decided to cure the infestation by removing the turf and re-sowing. He therefore entered into agreement with a contractor for the latter to buy the turf at £80 an acre and to remove it. The contractor did not remove all the turf immediately and meantime the farmer used the field to pasture his fully grown cattle. In these circumstances the farmer was held rateable. Goddard C.J. saying (*f*): "That he was using [the land] as pasture one would concede, but he was not using it as pasture only. He was using it partly as pasture and partly as a source of supply of the turf which he had sold to somebody else." Similarly where a farmer let a field which he normally used as pasture to a motor-cycle club about five times a year for the purposes of motor-cycle racing, it was held that he was liable to be rated for that field both because he was not using the land for pasture only, and because it was being used as a race-course: *Wimborne and Cranborne R. D. C.* v. *East Dorset Assessment Committee* [1940] 2 K.B. 420 (*g*). MacKinnon L.J. expressed the view "that the policy of the legislature is that if the farmer uses his land for commercial profit from other than agricultural operations, it is right that he should, in respect of that user and that profit, be subject to the

(*d*) s. 2 (2), Rating and Valuation (Apportionment) Act, 1928.

(*e*) Land used for pig-breeding is agricultural land: *I. R.* v. *Renfrewshire Assessor*, 1930 S.L.T. 164, but not land used as a silver fox farm: *I. R.* v. *Ross*, 1930 S.L.T. 214.

(*f*) At p. 940.

(*g*) See also *I. R.* v. *Countess of Cromartie*, 1930 S.L.T. 244.

burden of rates" (*h*). This decision also established that a very occasional use of land for racing purposes is sufficient to establish that land is used as a race-course, since even permanent and established race-courses may only be used as such on a few occasions each year (*i*).

"Land occupied together with a house as a park," is specifically stated not to be agricultural land and this is so apparently, even although the land be used as arable meadow or pasture ground. It would seem probable that as in some other statutes the word park in the Act is not intended to refer only to land which is technically and legally a park. Thus in *Re Ripon* (*Highfield*) *Housing Confirmation Order 1938* [1939] 2 K.B. 838, it was held that the word "park" in the Housing Act, 1936, is used in its popular sense and the court approved the following definition which is contained in the Oxford Dictionary: "a large ornamental piece of ground usually comprising woodland and pasture attached to or surrounding a country house or mansion and used for recreation and often for keeping deer, cattle or sheep." It is to be noted that the Act only denies the status of "agricultural land" where the parkland and house are in the same occupation. If they are separately occupied, the land is capable of qualifying as agricultural land.

Plantations and Woods

The Poor Relief Act, 1601 (43 Eliz., c. 2), specifically provided that the occupier of "saleable underwoods" should be liable to be rated to the relief of the poor. This liability was extended by the Rating Act, 1874 (*j*), to "land used for a plantation or a wood or for the growth of saleable underwood, and not subject to any right of common." The Local Government Act, 1929, repealed the provision "as respects agricultural land" (*k*). The present position would therefore seem to be that only woodlands which form part of "land occupied together with a house as a park" or which are "kept or preserved mainly or exclusively for purposes of sport or recreation," are still liable to be rated and then in accordance with the principles of the Act of 1874 (*l*). In *Watkins* v. *Herefordshire Assessment Committee* (1935) 154 L.T. 262, it was held that although a farmer had let the fishing rights in two rivers which flowed through his farmland, the beds of the rivers remained "agricultural land." It could not be suggested

(*h*) At p. 428.
(*i*) *Per* MacKinnon L.J. at p. 428, citing Goodwood and Ascot as examples.
(*j*) s. 3 (1).
(*k*) s. 137 and Twelfth Schedule, Part V.
(*l*) These principles are considered hereafter.

that the river beds were " kept or preserved " for the purposes of sport. In the same way it would seem that proof of some positive act of preservation of woodlands would be necessary in addition to proof of their use for sport before they would be liable to be rated.

Cottage gardens: allotments: nursery grounds

Gardens which exceed a quarter of an acre and which are attached to houses occupied by members of the labouring classes qualify for exemption as agricultural land. There is no statutory definition of " labouring classes," but the term would appear to refer to those whose work is primarily manual (*ll*). It is to be noted that there is no minimum size prescribed for an allotment in the Rating and Valuation (Apportionment) Act, 1928 (*m*). Land cannot be said to be nursery grounds unless sowing and planting take place upon it. Where grass in pasture land was improved by rolling and by fertilisers and then cut and sold as turf, the land was held not to be a nursery ground (*n*).

Agricultural Buildings

The Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), defines " agricultural buildings " as " buildings (other than dwelling-houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon."

Dwelling-houses, though they may be occupied together with agricultural land by persons engaged in agriculture, cannot rank as agricultural buildings and therefore remain rateable.

If buildings are to be exempt from rating as " agricultural buildings," they must not only be occupied together with agricultural land, but they must also be used in connection only with agricultural operations which are carried out on the agricultural land with which they are occupied. If in addition to being used in connection with agricultural operations carried out on the land with which they are occupied, buildings are also used in connection with agricultural operations carried out on other land, they will not be exempt from rating. In *Perrins* v. *Draper* [1953] 2 All E.R. 863, dairy buildings were used to pasteurise and bottle not only milk produced by cows kept on land in the same occupation

(*ll*) See the view expressed as to the meaning of " labouring population " in Ryde on *Rating*, 9th ed., at p. 169.

(*m*) See Allotments Act, 1928, s. 2

(*n*) *Butser Turf and Timber Co.* v. *Petersfield R. A.* [1950] 1 All E.R. 288, but *cf. James & Daniel Provan Ltd.* v. *Croydon Corpn.* (1938) 29 R. & I.T. 277.

as the dairy buildings, but also to pasteurise and bottle milk produced by cows on an adjacent farm not in the same occupation. In these circumstances the Court of Appeal held that the dairy buildings were not exempt from rating. Morris L.J. said (*o*) : " Is the dairy building which is occupied together with sixty-four acres of agricultural land used solely in connection with agricultural operations in that sixty-four acres of agricultural land? In my judgment, the answer to that question must be ' No,' for the reason that the dairy building is considerably used in connection with agricultural operations on other land. . . ."

It is, however, proper when considering agricultural operations carried out on the land to consider the land and building as a whole. It is not correct to draw a distinction between operations carried out on the land and operations performed in the buildings, nor to determine whether the operations on the land are subservient to the operations in the buildings.

In *Thomson* v. *Milk Marketing Board* [1952] 2 All E.R. 344 the appellants conducted an artificial insemination centre for cattle breeding on twenty-nine acres of agricultural land. The buildings consisted of bull pens, office blocks, a laboratory and fodder stores. The agricultural land only provided about one quarter of the food consumed by the thirty-two bulls. The bulls were normally kept in their pens, but occasionally let out on the land for exercise. In these circumstances the Lands Tribunal held that the buildings were not exempt from rating upon the ground that the land was " merely auxiliary to the buildings for the purposes of the activities of the centre." Their decision was overruled by the Court of Appeal, Birkett L.J. saying (*p*) : " The definition of ' agricultural operations on the land ' must be wide enough, I think, to include the work at the centre. It would be much too narrow a view to hold that the agricultural operations are to be confined to the growing of food and the use of the grass land and to exclude the work carried on in the buildings. The work of the centre must be considered as a whole when answering the question whether the buildings are used solely in connection with agricultural operations on the land."

The question whether buildings are used for agricultural operations only or are used for other purposes as well is a question of fact. Where quarter sessions found that the car which a farmer kept in one of his farm buildings was used partly for agricultural purposes connected with the land with which the building was occupied and partly for social and domestic purposes, the Divisional

(*o*) At p. 865.
(*p*) At p. 347.

Court refused to disturb their decision that the farmer was rateable for the building, upon the grounds that it was for quarter sessions to decide whether the social and domestic user was so slight as to bring it within the *de minimus* principle : *Parry* v. *Anglesey Assessment Committee* [1949] 1 K.B. 246.

It would appear that where the land in question consists of market gardens, buildings used in connection with the market gardening operations carried out on the land must not merely be "occupied together with" the land but must "be or form part of the market garden." The question whether or not a building forms part of a market garden is a question of fact.

(E) *Nationalised Industries*

Railways

The undertakings of the four principal railway companies were vested in the British Transport Commission by the Transport Act, 1947 (*q*). No hereditament which is occupied by the British Transport Commission for any of the purposes specified in section 86 (2) of the Local Government Act, 1948, is now liable to be rated, always provided that such hereditament does not consist of "premises occupied as a dwelling-house, hotel or place of public refreshment or so let out as to be capable of separate assessment" (*r*). The Commission is, however, required to make payments for the benefit of local authorities in lieu of rates (*s*).

Section 86 (2) states the non-rateable purposes to be :

> "(a) all purposes of the parts of the undertaking of the Commission which are concerned with the carriage of goods or passengers by rail or inland waterway or the provision of facilities for traffic by inland waterway : and
>
> (b) all purposes of any parts of their undertaking which are subsidiary or incidental to any such part as aforesaid, not being parts thereof concerned with road transport, sea transport or harbours. . . ."

In addition it is provided that services performed in the delivery or collection of goods carried or to be carried by rail or inland waterway shall be treated as performed in carrying on a part of the Commission's undertaking connected with such carriage and not in carrying on a part connected with road transport.

It is outside the scope of this work to consider these purposes in detail, but it may be noted that where a railway or canal

(*q*) s. 12. Certain light railways are not vested in the Commission.

(*r*) Local Government Act, s. 85 and s. 86 (1). The expression "premises so let out as to be capable of separate assessment" was considered in *Westminster Council* v. *Southern Ry.* [1936] A.C. 511.

(*s*) *Ibid.*, s. 85.

hereditament is partly occupied for such non-rateable purposes and partly for other purposes, the hereditament is not exempt from liability to be rated, except where the other purposes are those of " the central direction and control of the affairs of the Commission " but is to be rated as if occupied for those other purposes only (*t*).

Electricity Undertakings

It is provided by section 85 (1) of the Local Government Act, 1948, that no premises which are or form part of a hereditament occupied by the British Electricity Authority or an Area Board shall be liable to be rated. This exemption does not, however, apply to premises used as a dwelling-house (*u*). In lieu of rates the British Electricity Authority is required to make payments for the benefit of local authorities as laid down in the Act.

Non-statutory undertakings which have not been transferred to the Authority are still rateable.

Gas Undertakings: Coal Mines

There is nothing in the Gas Act, 1948, nor in the Local Government Act, 1948, to exempt from liability to be rated hereditaments now occupied by Area Gas Boards.

Coal mines were expressly made rateable by the Poor Relief Act, 1601 (43 Eliz., c. 2), and have remained rateable ever since.

The interest of all colliery concerns in unworked coal and mines of coal is now vested in the National Coal Board (*v*). Section 47 of the Coal Industry Nationalisation Act, 1946, expressly provides however : " Nothing in this Act shall be deemed to exempt the Board from liability for any . . . rate . . . or other charge whatsoever, whether general or local."

(*t*) *Ibid.*, s. 87, and proviso (ii) to s. 86 (2).
(*u*) *Ibid.*, s. 91.
(*v*) Coal Industry Nationalisation Act, 1946, s. 5 and First Schedule, Part I.

THE BANKRUPT LEGATEE

By B. S. Ker, m.a.(Cantab.), Solicitor

Pecuniary (*a*) legacies have a way of looking pleasant, harmless creatures. What more innocuous, for example, than " £100 to William "? But if William, when the testator dies, has the misfortune (i) to owe him money and (ii) to be or become bankrupt, this legacy is capable of giving the executors trouble. It poses questions they cannot ignore, for fear of paying more to William than he is entitled to, and opens a subject of mixed equity and bankruptcy law. One's aim in this article is to point out various problems which may arise and endeavour to supply the correct answers to them. It will be assumed throughout that the testator has given William a legacy of £100 and that William owed the testator—or was under a potential obligation to him to the tune of—£60 when the latter died.

1. *Suppose William is not bankrupt.* The executors will wish to know when the times comes whether they must pay William £100 or whether they may deduct his debt of £60 and pay him only £40. The answer is, as it ought to be, that they need only pay £40. The principle of equity (henceforth referred to as " the equity ") governing the point was briefly stated by Swinfen-Eady J. (*b*) in these words : " Where a fund is being distributed a party cannot take anything out of [it] until he has made good what he owes to [it]." Kekewich J. pointed out (*c*) that it was not a right of retainer or set-off but that the debtor had part of the testator's estate in his hands out of which he could pay himself his legacy. Scrutton L.J. enlarged this (*d*) in more homely language when—after supposing a situation in which the residue of an estate was to be divided between A and B, the executors had £500 in hand and A owed the estate £500—he said ". . . what happens? The executors are entitled under [this] principle to say : ' The real residue is £1,000, for you [A] must pay your £500. Half £1,000 is £500. We can give . . . B £500. We need give you nothing, because you have to give us £500, which we shall hand back, and there is no need to go through that performance; what you get is a release of your debt '." From these dicta can be deduced an important requisite : the equity " can

(*a*) This article does not apply to any other kind of legacy.
(*b*) *Re Rhodesia Goldfields Ltd.* [1910] 1 Ch. 239, at p. 247.
(*c*) *Re Akerman* [1891] 3 Ch. 212, at p. 219, which decided, *inter alia*, that the equity does not arise in the case of property *specifically* bequeathed or devised.
(*d*) *Re Melton* [1918] 1 Ch. 37, at p. 59.

only arise where there is a right [in the executors] to receive the debt . . . and the legacy must be payable by the person entitled to receive the debt " (*e*), *i.e.*, when the hand to pay and the hand to receive are the same (*f*). This, in my submission, is the real key to the difficulties arising on William's bankruptcy (when it happens). What I shall call the " acid test " whether or not the equity exists is simply; Was the situation at the testator's death (*g*) such that (A) the debt was payable by William to the estate and simultaneously (*h*) (B) the legacy was payable or ultimately payable from the estate to William? If it was—and only if it was—the equity came to life; and once alive it stayed and continues to stay alive until William's debt is extinguished. Moreover any assignee of the debt, including a trustee in bankruptcy (*i*), must take it subject to this equity (*k*), *i.e.*, the executors need only pay him £40 instead of £100. If these principles are grasped most of the difficulty in cases of the kind under discussion disappears.

2. *Suppose William was bankrupt at the date of the testator's death.* What precisely has happened? All his property and rights are vested in his trustee in bankruptcy (*l*). Any new right which vests in him, as, for example, his right to receive this legacy, vests in him only as *agent* for his trustee (*m*). The trustee is therefore the person really entitled to receive the legacy, and that as part of William's estate for distribution among those of William's creditors who prove for their debts. And these creditors are only entitled to receive so much of their debts—paid in the form of one or several dividends by the trustee—as William's estate will permit, after costs and preferential debts have been met. They are no longer entitled to payment of their debts *as such* but only to so much as the trustee is able to pay them out of the estate. They are entitled to *nothing* if they do not prove in the bankruptcy. In these circumstances, can the trustee insist on the executors' paying him the full £100 legacy bequeathed to William?

Applying the acid test and taking part (B) of it first; is the legacy payable, wholly or in part, by the executors to the trustee? Clearly yes, assuming there are enough assets in the testator's estate for the purpose. Then (part (A)), is William's debt of £60 payable

(*e*) *Per* Lord Cottenham L.C. in *Cherry* v. *Boultbee* (1839) 4 Myl. & Cr. 442, at p. 447.

(*f*) See counsel's argument in *Re Akerman* (1891) 65 L.T. 194, 195; [1891] 3 Ch. 212.

(*g*) See Swinfen-Eady L.J. in *Re Melton* [1918] 1 Ch. 37, at p. 49.

(*h*) *Ibid.*

(*i*) *Jeffs* v. *Wood*, 2 P.Wms. 128; *Bousfield* v. *Lawford*, 8 T.L.R. 619.

(*k*) This is, of course, the ordinary rule applying to any assignment, whether voluntary or for value or by operation of law, and is nothing special to the subject before us.

(*l*) Bankruptcy Act, 1914, s. 18 (1).

(*m*) *Per* Eve J. in *Re Pink* [1912] 1 Ch. 498, at p. 505.

by the trustee to the executors? We have just seen that the answer is "No." Until they prove for the debt the executors are entitled to nothing, and even then they are only entitled to so much of the amount they have proved for as William's estate will allow. The acid test consequently fails; no equity arises; so the executors must pay the trustee the full legacy (*n*) and prove in the bankruptcy for the debt. This, in fact, was what was decided in the leading case of *Cherry* v. *Boultbee* (*o*) where the legatee was bankrupt at the time of the testator's death.

3. *Suppose William goes bankrupt after the testator's death.* From the moment of death William had at any rate an inchoate (*p*) right to the legacy from the testator's estate and simultaneously owed the estate the debt. The acid test was therefore satisfied straight away and the equity came into being. When William is adjudicated bankrupt the right to the legacy vests in his trustee in bankruptcy subject to all equities, this one included (*q*). The result is that in *this* case the executors, with one important proviso, are only obliged to pay the trustee £40 of the legacy. This is where the beauty of the equity shines—from the executors' point of view. The proviso is that they must *not prove in the bankruptcy*. If they prove they surrender themselves to bankruptcy law and the equity is extinguished (*r*). I emphasise this because the first reaction of a conscientious executor who is unaware of this equity, when he hears of William's bankruptcy, is to feel, "I must lodge a proof of course or I shall not be doing my duty."

The tale is now mostly told; it only remains to clear up a detail or two and to give an example of the application of these principles to a complicated set of facts.

4. *What if William obtains his discharge from bankruptcy before the legacy is paid?* An absolute discharge wipes out the debt forever. There being no debt, there can be no equity. The executors must pay him his legacy in full. If the discharge is conditional, presumably the debt and the equity remain alive until the condition is fulfilled.

(*n*) If a dividend has been declared but not paid they can ("possibly") set this off against the legacy, *per* North J. in *Re Watson* [1896] 1 Ch. 925, at p. 933. *Cf. Re Hodgson* (1878) 9 Ch.D. 673, where no dividend had been declared by the trustee.

(*o*) 4 Myl. & Cr. 442. It is to be noted that although the equity is frequently described as "the rule in *Cherry* v. *Boultbee*" in that case it was held not to apply.

(*p*) *Deeks* v. *Strutt* (1794) 5 T.R. 690. This evidently is enough, but the point whether the executors ought first to have assented to the legacy does not appear ever to have been argued.

(*q*) See p. 177, *ante*.

(*r*) *Stammers* v. *Elliott* (1868) L.R. 3 Ch. 195.

5. *What if William's creditors agree to a composition?* This likewise extinguishes the debt, even if the executors were no party to it (*s*). They are only entitled to the amount due to them under the composition, which they may set off against the legacy (*t*).

6. *What if William's debt is statute-barred?* The debt is only unenforceable, *i.e.*, an *action* alone for the debt is barred; the debt is not extinguished " and if there are any equitable circumstances under which the debt may be available to the party to whom it is due, *without reference to an action*, the party is entitled to the benefit of the debt " (*u*). Thus the equity survives and the executors need pay only £40.

7. *What if William's debt is payable by instalments or in the future?* The equity only arises where the debt is actually due (*v*). The executors cannot do what the testator could not do, *e.g.*, call for *future* instalments or debts to be paid before they were in fact payable (*w*). They can therefore only deduct so much of the debt as is actually due.

8. *Interest.* This may be added to the debt at 4 per cent. (*x*).

In conclusion one would respectfully repeat the contention that the clue to the solution in these cases is the acid test. Take, for example, the following set of facts. B, a bank, lends S money. T guarantees the loan. T in his will gives S a share in his estate after T's wife's (W's) death. T dies and W survives him. S assigns his prospective interest in T's estate to B. S later goes bankrupt still owing B £1,000. B proves and receives £500 out of the bankruptcy, and T's executors pay B the balance (£500) under the guarantee. B, with the concurrence of the trustee in bankruptcy, assigns S's interest in T's estate to Y. W dies, so that S's share of the estate (say £800) becomes payable to Y. Can T's executors deduct from it the £500 which they paid under the guarantee and pay only £300 to Y? They can. As soon as T entered into the guarantee S was liable to indemnify him if B resorted for payment to T. This liability existed at the death and before S went bankrupt. At the same time S became entitled in remainder to a share in the estate. The acid test was therefore satisfied. All the assignees of S's share—B, the trustee in bankruptcy, and Y—took subject to this equity. This enables T's executors to bring into account the £500 paid under the guarantee and pay only £300 to Y (*y*).

(*s*) *Re Orpen* (1881) 16 Ch.D. 202.
(*t*) *Ibid.* (*u*) *Courtenay* v. *Williams* (1846) 15 L.J.Ch. 204, 207.
(*v*) *Cf. Re Melton* [1918] 1 Ch. 37, where the cross obligations were only *potential* at the date of death but the equity applied.
(*w*) *Re Abrahams* [1908] 2 Ch. 69.
(*x*) *Re Watson* [1896] 1 Ch. 925.
(*y*) See *Re Melton* [1918] 1 Ch. 37.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By F. R. Crane, Barrister-at-Law

Lloyds Bank Ltd. v. *Trustee of the Property of O., a Bankrupt* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443 *sub nom. Lloyds Bank Ltd.* v. *Oliver's Trustee*

Barclays Bank Ltd. v. *Bird* [1954] 2 W.L.R. 319; [1954] 1 All E.R. 449

Deserted wife in matrimonial home—mortgage by husband prior to desertion—Legal or equitable mortgage—mortgagee's right to possession—Married Women's Property Act, 1882, *s.* 17.—The problems raised by the right of a deserted wife to remain in the matrimonial home owned by the husband are too well known to need recapitulation. In these two cases it was held that the earliest moment at which the wife's right comes into existence is the time of desertion. Consequently it is postponed to those of mortgagees claiming under mortgages made by the husband prior to the act of desertion, whether the mortgages be legal or equitable. Either type of mortgagee may obtain an order of possession against the wife. (As to procedure which is by way of summons under R.S.C. Ord. 55, s. 8A, see *Alliance Building Society* v. *Varna* [1949] Ch. 724; *Alliance Building Society* v. *Shave* [1952] Ch. 581.)

In the first case—conveniently called *Oliver*—the order of events was residence by husband and wife in the property as the matrimonial home, two successive legal mortgages by the husband, a short period when the matrimonial home was elsewhere, renewed residence, desertion by the husband (and incidentally bankruptcy) and a claim for possession by the mortgagees. Counsel for the wife asserted that her right arose on entry into the property as the matrimonial home, basing his argument on both the jurisdiction to order restitution of conjugal rights and some of the recent cases, including *Bendall* v. *McWhirter* [1952] 2 Q.B. 466. Upjohn J., however, rejected this contention and held that the wife's right arose only on desertion, so that the mortgagee was entitled to possession. He briefly dismissed as "fantastic" the further suggestion, designed to overcome the difficulty of the period of residence elsewhere, that the possibility of a wife's right arising would bind even mortgagees of a bachelor. The facts given in the report show that the wife in *Oliver* had obtained an order under section 17 of the Married Women's Property Act, 1882, restraining the husband from any act or disposition interfering with her right to reside, but nothing turned on this.

In *Bird* the facts were similar, though there was no period of matrimonial residence elsewhere to overcome. The mortgage was

however equitable, protected by a deposition of title deeds, and the Bank had in pursuance of the usual power of attorney contained in the mortgage, executed a legal mortgage. This took place after the desertion and the order under the Married Women's Property Act, 1882, s. 17, but before the summons. Harman J. held (i) following *Oliver,* that the wife's right was not inchoate on entry crystallising on desertion, but came into existence only on the latter event; (ii) the fact that Barclay's Bank were then merely equitable mortgagees made no difference, because the only distinction as to possession between a legal and equitable mortgagee is that the latter must obtain possession through the court, which he may now do without asking for any other form of relief at the same time; (iii) that, in executing a legal mortgage under the power of attorney on, ostensibly, the husband's behalf the Bank was not infringing the order under section 17; he referred to *Tingley* v. *Miller* [1917] 2 Ch. 144, where it was said that an attorney under an irrevocable power was "absolutely independent of his principal." (In that case the donor of the power had become an enemy alien, but the power remained effective.) In *Bird* the Bank had no knowledge of the order under section 17, but the reasoning would seem applicable even if there was notice. Finally, Harman J. refused to extend the usual time (28 days) within which possession had to be given, doubtless having in mind his own remark, earlier in the judgment, that extension of the privilege of the wife might be detrimental to the public interest by discouraging prospective mortgagees.

These decisions are likely to be generally welcomed. They place the deserted wife in the same position as other persons claiming through the mortgagor, *e.g.,* a tenant under a lease not binding on the mortgagee—*Dudley and District Benefit Building Society* v. *Emerson* [1949] Ch. 707. It is plain that extravagant formulations of the wife's rights are not likely to receive judicial encouragement. Nevertheless it is submitted that it would be dangerous to draw any conclusions concerning dispositions by the husband after desertion—see the note on *Street* v. *Denham* [1954] 1 All E.R. 532, *infra.*

Street v. *Denham* [1954] 1 All E.R. 532 (Hants Assizes)

Deserted wife in matrimonial home—conveyance by husband—alleged contract to surrender licence—implied or contractual licence. —A husband deserted his wife, telling her she could remain in the matrimonial home so long as she had the children and his grandmother with her. Some years later negotiations for the husband to purchase a new home for the wife were begun, but fell through at an advanced stage. Thereupon the husband, who had been living with the plaintiff since the desertion, conveyed the property to her, apparently for value (see p. 534), though the report is not entirely clear. The plaintiff sued the wife for possession.

Lynskey J. in a considered judgment held (contrary to his own inclination) that he was bound by the authorities to find the wife's right good against the plaintiff. He referred to *Errington* v. *Errington* [1952] 1 K.B. 290; *Ferris* v. *Weaven* [1952] 2 All E.R. 233

and *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, especially a passage in Denning L.J.'s judgment in the latter case where he used the illustration of a guilty husband conveying to his mistress to show that successors on title should be bound. In this case the action was, of course, part of a concerted design between husband and plaintiff, as in *Ferris* v. *Weaven, supra.* The decision does not, therefore, cover the case of a genuine sale or mortgage to a stranger, especially as the learned judge did not refer to the restrictive interpretation of *Bendall* v. *McWhirter* by Jenkins L.J. in *Bradley-Hole* v. *Cuzens* [1953] 1 Q.B. 300. On the other hand, it gives no discouragement to those who would have a purchaser with notice bound. Investigation to discover the claims of persons residing on the premises is still necessary, though the wife acquires no rights till desertion (see notes *supra*, p. 180).

In the instant case Lynskey J. further held (i) there was no contract for a move because an essential term (in whose name the new house was to stand) had not been concluded and (ii) as the wife had a right implied by law to stay, there was no consideration for her promise to have the children and the grandmother, and consequently there was no contractual licence. Therefore the plaintiff could not allege a breach thereof in the wife's unwillingness, at the time of the action, to have the grandmother any longer.

Richardson v. *Jackson* [1954] 1 W.L.R. 447; [1954] 1 All E.R. 437

Restrictive covenant—application for modification during action for enforcement—grounds for stay of proceedings—Law of Property Act, 1925, *s.* 84 (9).—Section 84 (1) of the Law of Property Act, 1925, gives the "Authority"—now the Lands Tribunal (Lands Tribunal Act, 1949, s. 1 (4))—power to discharge or modify restrictive covenants on various grounds. Where an action to enforce restrictive covenants has been brought the defendant may ask the court for leave to apply to the Authority and for a stay of proceedings in the meantime (L. P. A., 1925, s. 84 (9)). The court has statutory power to declare whether land is subject to covenants and to what extent (L. P. A., 1925, s. 84 (2); see, *e.g., Re Ecclesiastical Commissioners Conveyance* [1936] Ch. 430) and an inherent power to refuse to enforce covenants; for example, where changes in the neighbourhood have rendered them valueless (*Chatsworth Estates Co.* v. *Fewell* [1931] 1 Ch. 224, at p. 230). Nevertheless the court cannot modify restrictive covenants and in principle, therefore, an order under L. P. A., 1925, s. 84 (9) should be made, provided there seems a reasonable chance of success before the Authority, and the request under the subsection is made promptly. This was the decision of Danckwerts J. in the present case, following *Fielden* v. *Byrne* [1926] Ch. 320.

On the meaning of "promptly," the learned judge held that the defendants were entitled to wait until action brought, to see if the plaintiff meant business, and for a reasonable time after pleadings to consider the prospects of success under section 84. Here the writ was issued in May, the statement of claim delivered in June

and the defence in July, 1953; application under section 84 (9) was made in December. With some hesitation Danckwerts J. held that this was done sufficiently promptly. No reference was made to *Chatsworth Estates Co.* v. *Fewell, supra,* where Farwell J. refused an order under section 84 (9) because the defendant "elected not to make an application before action, but to wait and see whether the plaintiffs would really bring an action" ([1931] 1 Ch., at p. 234). In that case, after objection to the defendant's user had been taken, the defendants suggested in October an application under section 84; the plaintiffs at once replied that they were instructed to issue a writ, but would hold their hands for a few days, but in the event nothing was done till the writ was issued in the following June. The cases seem to be reconcilable on the basis that there was no election in *Richardson* v. *Jackson,* but this does not satisfactorily determine the extent to which a prospective defendant may safely use section 84 as an argument in his discussions with a prospective plaintiff.

Southgate Corporation v. *Park Estates (Southgate) Ltd.*
[1954] 2 W.L.R. 343; [1954] 1 All E.R. 520

Private street works—unreasonable—Private Street Works Act, 1892, *s.* 7 (*d*).—The decision of the Divisional Court, noted *ante,* Vol. 17, p. 500t, has been affirmed by the Court of Appeal, on the same grounds, so no extended note is now necessary. The court emphasised the special nature of the facts, and was clearly reluctant to place any undue limit on the discretion of local authorities to decide whether, when and how to make up streets.

Re Churston Settled Estates [1954] 2 W.L.R. 386

Power of appointment with consent—joint power of appointment —whether general or special—Rule against Perpetuities.—This summons was brought to ascertain whether two powers of appointment by deed were general or special for the purposes of the rule against perpetuities, for on this point turned the validity of various exercises of the powers. The powers were, shortly, (i) to A and B jointly with the consent of C during her life and (ii) to A, B and C jointly or in default to C and the survivor of A and B jointly. Roxburgh J. held both powers special, so that all subsequent limitations under what were in effect various resettlements had to be read back into the original document. He followed *Re Watts* [1931] 2 Ch. 802 (power with consent) and referred to remarks in the House of Lords and Court of Appeal in *Charlton* v. *Att.-Gen.* (1879) 4 App.Cas. 427; (1877) 2 Ex.D. 398 (*sub nom. Att.-Gen.* v. *Charlton*), a case on the application of the Succession Duty Act, 1853.

These notes were required for the press too soon to allow full consideration of this decision, which seems to raise some important matters. The writer has not yet traced a previous case holding a joint power (which is not uncommon) special for the purposes of

perpetuity; indeed, in *Att.-Gen.* v. *Charlton,* where there were likewise successive powers and trusts thereunder, the joint power seems to have been regarded as general in the court of first instance—see the remarks of Amphlett B. at (1876) 1 Ex.D. 204, at p. 215. Again, the rule *delegatus non potest delegare* normally applies to a special but not to a general power, yet when exercising joint powers the appointors usually begin by limiting further joint powers, so as to permit resettlements in successive generations without the need for anyone to disentail. It is therefore proposed to examine the decision in *Re Churston,* and the law relating to joint powers generally, more fully in a subsequent article.

Re Allan, deceased [1954] 2 W.L.R. 512; [1954] 1 All E.R. 646

Power of appointment in favour of surviving spouse—exercise of power—subsequent divorce—construction—objects of power.—A husband on his marriage exercised by deed a power to appoint a life interest "for the benefit of any wife . . . who may survive him." The marriage was dissolved and the husband had now died. The Court of Appeal held, following their earlier decision in *Re Williams' Settlement* [1929] 2 Ch. 361, that the normal construction of such powers is that the spouse must satisfy both conditions to qualify as an object of the power—that is, must both survive and at that moment be wife or husband. Consequently the plaintiff ex-wife could not take. The judgment of the Master of the Rolls shows that the court will not be ready to find particular words or circumstances to justify a different construction.

This point will be relevant not only to financial arrangements on dissolution of marriage, but also in considering the provision to be made in any settlement on marriage. In the present case the court did not accede to the argument that the power was intended to enable the husband to provide an adequate marriage consideration in the legal sense. Nor did they allow sympathy for the wife, who as petitioner in the divorce proceedings had merely exercised her legal rights, to affect the question of construction.

London County Council v. *Tann* [1954] 1 W.L.R. 371; [1954] 1 All E.R. 389

Building or structure—shelter for car—steel framework with canvas cover—London Building Act, 1930, *s.* 22.—The London Building Act, 1930, s. 22, replacing earlier enactments, prohibits the erection of any "building or structure" in front of the general building line; contravention leads to penalties and an order for removal.

The respondent erected in his front garden a car shelter consisting of a tubular steel framework, screwed to the gateposts and covered with canvas, attached by tapes and tie-ropes. The Divisional Court (Lord Goddard C.J., Byrne and Parker JJ.) reversing the magistrate,

held unanimously that this was within the prohibition but differed in their reasoning. Lord Goddard C.J. said (i) that "structure" was not to be construed *ejusdem generis* with "building" (ii) that whether there was a structure was to be determined as a matter of common sense, having regard to the purpose and permanence of the erection, referring to *Lavy* v. *L. C. C.* [1895] 2 Q.B. 582. Byrne J. concurred, but Parker J. thought structure meant "a structure in the nature of a building" and that the magistrate had gone wrong in assuming that a steel and canvas erection could not be in the nature of a building. The point of construction does not seem to have been precisely taken in earlier cases, but it has been held that though a wall 11 feet high to carry advertisements is within the section, a dwarf wall 2–3 feet high is not (*Lavy* v. *L. C. C.*, above), nor is a steel showcase to carry advertisements (*L. C. C.* v. *Illuminated Advertisements Co.* [1904] 2 K.B. 892). Moreover, the House of Lords has said that the object of the legislature was to secure a general line of building (*Lilley* v. *L. C. C.* [1910] A.C. 1). It is submitted, with respect, that the reasoning of Parker J. is to be preferred both on these authorities and because if the word "structure" stands alone it is difficult to see why the section should not extend to dwarf walls, garden fences, pergolas and so on. The *ejusdem generis* construction seems to give adequate control of amenity without opening any door to undue interference with the rights of individual landowners.

Tithe Redemption Commission v. *Runcorn Urban District Council* [1954] 2 W.L.R. 518; [1954] 1 All E.R. 653

Tithe redemption annuity—highway authority—"estate owner"—Tithe Act, 1936, *s.* 17 (1) (3).—*Law of Property Act,* 1925, *ss.* 7 (1), 205 (1) (v) and (ix).—The decision of Danckwerts J. (noted in Vol. 17, p. 500s) has been affirmed by the Court of Appeal.

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2. *TRUSTS*

By F. R. Crane, Barrister-at-Law

Re Dark, deceased [1954] 2 W.L.R. 509; [1954] 1 All E.R. 681 (*sub nom. Re Dark's Will Trusts*)

Settled land—trustees—personal representatives of last surviving trustee—power to retire and appoint new trustees—Settled Land Act, 1925, *s.* 30 (3); *Trustee Act,* 1925, *ss.* 36, 64, 68.—Roxburgh J. began by describing this case as "interesting, if only as an example to show how dangerous it is to think words in an Act of Parliament mean what they say"; with respect, some might feel that the moral was the opposite, for his lordship was involved in a considerable exercise in literal interpretation.

The plaintiffs were personal representatives of the late sole surviving executor and trustee of a will whereby on January 1, 1926, a farm had become settled land. Consequently they were trustees of the settlement by virtue of the Settled Land Act, 1925, s. 30 (3). They desired to retire and appoint new trustees. Section 30 (3) allows a sole personal representative to appoint additional trustees but Roxburgh J. held that this did not permit two representatives to retire and appoint. However, the Trustee Act, 1925, s. 64, makes the provisions of that Act concerning new trustees applicable to Settled Land Act trustees appointed by (*inter alia*) "any instrument." By section 68 (5) of the Trustee Act the word "instrument" includes an Act of Parliament—here the Settled Land Act—so the plaintiffs could retire and appoint under the powers conferred by the Trustee Act, s. 36. There was, as the learned judge concluded, "no further difficulty in the case."

A point of procedure has therefore been usefully clarified. A word of caution is, however, necessary because the definitions of section 68 can be excluded by the context. For example, in *Re Tattersall* [1906] 2 Ch. 399 "instrument" in the investment clauses of the Trustee Act, 1893, was held not to include an Act of Parliament. Each question of construction must be considered separately.

In the Estate of Campbell, deceased [1954] 1 W.L.R. 516; [1954] 1 All E.R. 448

Re Worthington, deceased [1954] 1 W.L.R. 526; [1954] 1 All E.R. 677

Executors and Administrators—Trustees—charging clauses—trustee corporations—jurisdiction of court to order remuneration.—These two decisions illustrate and apply the rules (i) that an executor, administrator or trustee cannot charge for his services unless he is authorised to do so, (ii) that authority must be given either by the instrument, or by the court in exercise of its inherent or statutory jurisdiction and (iii) that the ordinary charging clause applicable to solicitors or professional trustees does not permit a trust corporation to charge.

In *Campbell* the testator inserted the usual solicitors' charging clause, but later by a codicil replaced his solicitor executors by the Westminster Bank. The decision in *Re Cooper* (1939) 160 L.T. 453, prevented the Bank relying on the charging clause, but Wallington J., taking the view that the testator obviously intended to replace one professional trustee by another, authorised the Bank to make its usual charges in exercise of the inherent power of the court (as to which see *Re Masters* [1953] 1 W.L.R. 81, noted *ante*, Vol. 17, p. 87).

In *Worthington* the plaintiff solicitor, as attorney for a widow living abroad, had taken out letters of administration to an insolvent estate in the hope of saving something from the wreck. Ultimately the estate had to be administered in bankruptcy and the plaintiff wished to prove for his costs. Upjohn J. refused to authorise remuneration because the power to do so should be exercised only sparingly and in exceptional circumstances; the mere fact that the plaintiff had acted honestly and properly was not sufficient.

It would seem that an application made before representation is taken out is more likely to succeed, because the court will be in the difficulty that a refusal to authorise remuneration may condemn the estate to remain unadministered, or involve trouble and expense.

In addition to its inherent power the court has statutory power to authorise remuneration where it makes the appointment (Trustee Act, 1925, s. 42), and the Public Trustee can always charge (Public Trustee Act, 1906, s. 9).

Re Yates' Settlement Trusts [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619

Practice—application to approve compromise varying trusts of settlement—Adjournment pending result of appeal in different case—discretion of judge—special circumstances.—This appeal was described by the Master of the Rolls as "curious and unusual." Persons entitled under the *Yates* settlement applied to the court for approval of a compromise, relying on the decision in *Re Downshire Settled Estates,* reported with *Re Chapman's Settlement Trusts* and *Re Blackwell's Settlement Trusts,* at [1953] Ch. 218 and noted *ante,* Vol. 17, at p. 81. Harman J. adjourned the hearing without reaching any conclusion because *Re Chapman* was the subject of an appeal to the House of Lords. The plaintiffs appealed principally on the ground that the settlor was eighty years old and in precarious health and that the objects of the compromise would be frustrated if he died before the court's sanction was obtained. The Court of Appeal, though stressing that they would normally be reluctant to interfere with the discretion of the judge of first instance as to adjournment, felt that the special circumstances required that the matter be heard, and so directed.

This appeal was heard on March 1, 1954, and a note in *The Times* of March 26, shows that on March 9, Harman J. sanctioned the compromise. The same issue of *The Times* reports the decision of the House of Lords in *Re Chapman* and shows that the House considers the jurisdiction enunciated in *Re Downshire* as unduly wide.

Re Bransbury, deceased [1954] 1 W.L.R. 496; [1954] 1 All E.R. 605

Advancement—general power of appointment—creation before and exercise after January 1, 1926—*applicability of statutory power of advancement—Trustee Act,* 1925, *s.* 32.—Unless the settlement is controlled by the Settled Land Act, 1925, the Trustee Act, 1925, s. 32, gives to trustees a statutory power of advancement provided the trusts are "constituted or created" before the commencement of the Act. These words have had to be interpreted in relation to powers of appointment conferred by an instrument taking effect before the Act, but which are exercised—and so bring into being the particular beneficial interest—after the Act. The relevant time is, of course, that on which the exercise is effective—the date of

execution of a deed, and the date of death where the power is exercised by will.

In *Re Batty* [1952] Ch. 280, Vaisey J., dealing with a special power of appointment, held that the trusts were created or constituted by the original instrument conferring the power, so that the power of advancement was not available. In the present case a general power was created in 1921 and exercised by a will taking effect in 1934. Vaisey J. distinguished *Re Batty* because the donee of a general power is "virtually the owner of the property," citing Lord Romer in *Williams* v. *Muir* [1943] A.C. 180, at p. 488. The trustees could therefore make advancements under the statutory power.

It would seem that a mixed or hybrid power, where there is either some slight limit to the objects of the power (*e.g.*, to everyone but himself—*Re Park* [1932] 1 Ch. 580), or to the uncontrolled exercise thereof (*e.g.*, consent—*Re Watts* [1931] 2 Ch. 302), is likely to be submitted to the test applied in *Re Bransbury* and, therefore, may be held special for the purposes of section 32.

It may be remarked that the statutory power of maintenance under the Trustee Act, 1925, s. 31, is available where the interest arises under the exercise after 1925 of a special power created before 1926 (*Re Dickenson* [1939] Ch. 27. Obviously it should also apply in such circumstances if the power is general or mixed. The difference in construction depends on the wording of section 31 which "does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of the Act."

Re Powles, deceased [1954] 1 W.L.R. 336; [1954] 1 All E.R. 517

Discretionary trust—Power to trustees to resort to capital—Construction—Whether permissible to distribute whole capital.—Trustees are frequently given a discretion to apply income or capital for the maintenance or benefit of beneficiaries. In such cases the limits of the discretion depend upon the construction of the relevant clauses in the settlement or will (see Lewin on *Trusts*, 15th ed., pp. 304–306, 332–337). Here a testatrix, dying in 1929, gave a fund, producing £375 per annum, to her trustees upon trust to use the income for her son Francis, until he did anything whereby, if the income had been his absolutely, it would have become payable to another; on that event or his death the fund was to fall into residue. The will also gave the trustees power to resort to the capital of the fund for "the maintenance and general benefit" of Francis. The trustees asked whether they could, without any special reasons, pay the whole fund to Francis, now aged 70. Harman J., noting especially the possibility of cesser of the trust in Francis' lifetime and distinguishing *Re Vestey's Settlement* [1951] Ch. 209, as turning on its particular facts, held that the testatrix had effectively circumscribed the discretion of her trustees, so that they could pay over capital only if satisfied that to do so would be for the general benefit—in a wide sense—of Francis. In short, the trustees had to apply their minds to the question of benefit and genuinely exercise their discretion.

3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Bagshaw [1954] 1 W.L.R. 238; [1954] 1 All E.R. 227

Identification—changed constitution of charity—no lapse.—If a gift is made to a charitable institution which is limited to that institution and that institution is radically altered in nature, the gift will lapse. The gift may be saved, however, either by treating it as a gift for a charitable purpose exemplified by the institution or as a gift to that institution considered as still retaining its basic identity, in spite of changes in its name or constitution. In the instant case the B Hospital was the subject of a trust deed executed in 1921. The deed conferred power on its governors to alter its objects. In 1942 the testatrix executed a will leaving her residuary estate to the B Hospital. As the National Health Service Scheme became known, the subscribers to the B Hospital held a meeting and changed their objects so as to omit the main object of hospital treatment and cover supplemental amenities for patients, which were still of a charitable nature. This was effected in 1947. The testatrix died in 1951.

The claimants were the next-of-kin of the testatrix, claiming under a resulting trust (relying on the disappearance of the original B Hospital in the modified B charity), the local Hospital Management Committee, in whom the hospital itself had vested under the Act of 1946, and the B charity. Danckwerts J. held that the gift had been to the B Hospital, that this was identifiable with the new B charity, rather than with the Hospital premises, and that the B charity took.

Had no conversion of the trusts of the trusts deed occurred, it is clear that the Management Committee would have taken (*Re Morgan* [1950] 1 All E.R. 1097; *Re Little* [1953] 1 W.L.R. 1132). Had the new terms of the B trust not been strictly charitable a difficulty would have arisen and some scheme might have been necessary. The National Health Service Act, 1946, is often termed a "confiscatory" statute by the judges, and this may influence the decisions in this field. In *Re Hutchinson's Will Trusts* [1953] 2 W.L.R. 872, a Health Service hospital did succeed to funds left to a hospital which had been merged with others, but there the original charity did not survive in any sense and the gift was held to be a gift for purposes now discharged by the Hospital Service.

(Theobald, 11th ed., 355.)

Re Spensley's Will Trusts [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178

Charity—public nature—political objects.—The main point of this case was that a gift was held to be political rather than charitable. Land was to be used for an indefinite period as a residence for the Australian High Commissioners in England from time to time, in connection with their office. It had been held that a guest house for distinguished visitors is not a charity (*Re Corelli* [1943] Ch. 332)

and that promotion of international and inter-racial goodwill is not certain enough to be clearly charitable (*Re Strakosch* [1948] Ch. 37). The Chequers Estate Act of 1917 was necessitated by the admission that a home for a statesman was not a charitable object. The second point was the rejection of an argument that the gift over was charitable and so saved from failing for perpetuity. This gift over was to the National Trust, the trustee of the original devise, for such purposes as it and a private person should decide. It was urged that the Trust could only apply it to its own and therefore to charitable purposes (*Re Flinn* [1948] Ch. 241). There were two drawbacks to such an argument. In the first place the " Chequers " trust was not charitable and yet the National Trust were expected to act as trustees of that. Again, it was not clear that the private person might not have insisted on application of the trust property to some purposes not connected with the National Trust. Hence the gift over could not be treated simply as a gift for the general purposes of the National Trust. The Court of Appeal reversed Vaisey J. [1952] Ch. 886.

The gift has something in common with gifts for the upkeep of famous buildings. It might have been good if limited within the perpetuity period, as a trust for the occupiers from time to time. It would also have been good if left directly to the National Trust (*Re Verral* [1916] 1 Ch. 100.)

(Theobald 348, 349.)

Re Koettgen [1954] 2 W.L.R. 166; [1945] 1 All E.R. 581

Education—public objects.—Residue was left by will to promote commercial education by paying tuition for students unable to afford it. This was held by Upjohn J. to be charitable as an educational object. There was a rider in the gift that preference should be shown to employees of a certain firm. The learned judge held that this made no difference. The primary object of the trust was public and not private. He therefore distinguished *Re Scarisbrick* [1951] Ch. 622 and *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297. The case also seems, with respect, close to *Gibson* v. *South American Stores* [1950] Ch. 177, where there was provision for the relief of poverty among employees of a company, since there was a means test to be applied. Draftsmen should be cautious in assuming that a mere change in form will save an otherwise uncertain gift, *e.g.*, a gift for employees irrespective of means.

(Theobald 339.)

Re Wright [1954] 2 W.L.R. 481

Charitable objects—impracticability—relevant date.—If a charitable object is impossible of achievement and no general charitable intention appears, the gift to it lapses and may go as property

undisposed of by will. On the other hand if the purpose is possible at the time of the testator's death it will be applied *cy-prés* to similar purposes if it becomes impossible after that death, even if no general charitable intention appears. This point made the date important when practicability was judged. Roxburgh J. held, following *Re Moon* [1948] 1 All E.R. 300, that the right date was the date of the death and not some later date. The testatrix died in 1933 and the tenant for life under the will died in 1942. It might well be, though no figures are given in the report, that the residue of the estate might have been adequate to set up and maintain a convalescent home in 1933, whereas by 1942 inflation might have made it insufficient. As the home was not meant to be set up until the life tenant died the solution may seem a little unreal, but the decisions are in line with the decisions as to gifts to charities which cease to exist between the date of the testator's death and the date of payment (*Re Slevin* [1891] 2 Ch. 236).

(Theobald 356.)

Re Sanders' Will Trusts [1954] 2 W.L.R. 487

Relief of poverty—housing of working classes not charitable—lapse.—Harman J. has held that a gift for housing the working classes is not a charitable gift as poverty and labour are not synonymous. Labour has won relief from the abuses of the past by direct legislative action and is not dependent on charity from above. In other cases rather different provisions have been held charitable, *e.g.*, free cottages for women of the working classes over the age of sixty (*Re Glyn Will Trusts* (1950) 66 T.L.R. (Pt. 2) 510), as poverty was clearly implied. Housing would appear now to be a social or legislative object, rather than a charitable object. It is a matter of political concern for all, rather than a matter for private contribution.

(Theobald 336.)

Re Hillier's Trusts [1954] 1 W.L.R. 9

General charitable intention.—The Court of Appeal has reversed the above decision and held that contributions for the Slough Hospital are not recoverable (*The Times*, April 9, 1954).

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

In the Estate of Campbell [1954] 1 W.L.R. 516; [1954] 1 All E.R. 448

Will—interlineation—presumption rebutted—valid alteration.—There is a presumption that alterations and interlineations in wills were made after the will was executed and are therefore ineffective. In the instant case the document was a home-made codicil drawn up in hospital and attested by a doctor and nurse. There was no attesting clause referring to such interlineations, nor could the attesting witnesses tell whether or not they had been made before attestation. The interlineations were not attested or even initialled. Wallington J. held, on the strength of an examination of the document, that the interlineations had been added after the will was drawn up but before its execution. The document had been left in the testator's possession after the witnesses left him. The decision certainly leaves little scope for the presumption above referred to.

(Theobald 43.)

Re Allen (No. 2) [1954] 2 W.L.R. 333; [1954] 1 All E.R. 526

Condition precedent—date to qualify—remainder after life interest.—Where a legatee is given a legacy on condition that he satisfies a certain condition the material date is the date when he would actually be entitled to possession and enjoyment. It is not necessary that he satisfy the condition at the time of testator's death. It is not sufficient that he may satisfy the condition after the life tenant's death (*Bartleman* v. *Murchison* (1831) 2 Russ. & M. 136).

(Theobald 547.)

Marsden v. *Regan* [1954] 1 W.L.R 423; [1954] 1 All E.R. 475

Liability of executrix for rent after death of testatrix—relief.—An executrix who occupies a shop in order to save the goodwill may be sued in full for use and occupation of the shop by the landlord, in her capacity as occupier. In this case, however, the landlord chose to sue her in a representative capacity. Arrears of £29 were claimed as well as later arrears. The Court of Appeal held that they would limit her liability to £22, being assets she had had and wasted. She was relieved of all further liability under Trustee Act, 1925, s. 61, as having acted honestly and on legal advice. The defendant had not pleaded *plene administravit* in the county court and would have been liable for at least £29 had no relief been given.

(Williams on *Executors*, 13th ed., 1066, 1110.)

Re Deans [1954] 1 W.L.R. 332; [1954] 1 All E.R. 496.

Creditors' administration—alternative procedure rejected.—D deposited securities with a bank to secure L's overdraft, and died intestate. The bank wished to realise the securities without taking out administration to D's estate, relying on Trustee Act, 1925, s. 51 (1) (*v*), and asking that the Official Solicitor be appointed, since they were vested in the senior Probate Judge. The court rejected this interpretation of its power under section 51. The case is peculiar but shows the limited nature of the trusteeship of the judge.
(Williams on *Executors,* 1172.)

5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Commonwealth of Australia v. *Milledge* (1954) 4 P. & C.R. 135

Compulsory purchase—valuation—averaging conflicting figures.—This was an appeal (to the High Court of Australia) from a South Australian judge who, unable to say that, of the six conflicting valuations of the property concerned put forward in evidence before him, any one was more convincing than the others, took the average of the six, and used the figure so obtained as the basis of his award of compensation. The Appellate Court had no difficulty in holding that this was so clearly wrong in principle that a new trial must be ordered. The duty of a tribunal assessing compensation for compulsory purchase, is to apply for itself the recognised principles of valuation. Taking an average of conflicting figures is not applying the recognised principles of valuation. Now and again, in this country, we do find that an award is made that happens to "split the difference" between the figures put forward on the two sides; but this, of course, may be coincidence rather than recourse to the method openly employed by the judge in the present case.

6. *LANDLORD AND TENANT*

By J. Muir Watt, m.a., of the Inner Temple, Barrister-at-Law

Martin-Smith v. *Smale* [1954] 1 W.L.R. 247;
[1954] 1 All E.R. 237

Agricultural holdings—Condition imposed in connection with consent to notice to quit—question whether tenant could complain of non-fulfilment—enforcement for Minister only.—In this case the

Agricultural Land Tribunal, in giving consent to the landlord's notice to quit, imposed a condition that the landlord should appoint a bailiff approved by the appropriate county agricultural executive committee. The condition was imposed under the power conferred by section 25 (5) of the Agricultural Holdings Act, 1948. The landlord appointed a bailiff, but the appropriate committee gave the appointment a somewhat qualified approval. The tenant refused to quit, alleging that the landlord had not complied with the condition. The Court of Appeal held, and (if one may say so with respect) there is no doubt that their decision is correct, that even if the condition was not fulfilled (on which the court expressed no opinion) it was not a matter of which the tenant could take advantage. The only sanction is action by the Minister under section 29. The tenant ought to have quitted in accordance with the notice before any question arose about the fulfilment of the condition.

(Jackson's *Agricultural Holdings*, 10th ed. p. 141.)

Woodward v. *Earl of Dudley* [1954] 1 W.L.R. 476; [1954] 1 All E.R. 559

Agricultural holdings—notice to quit part of a holding—survivor of joint tenants—section 24 (2) (g) *of the* 1948 *Act.*—In this case an agricultural holding had been let to joint tenants. After the death of the survivor of the joint tenants the landlord served a notice to quit on the executor of the survivor, which was apparently intended to operate under section 24 (2) (g) of the Agricultural Holdings Act, 1948. The notice to quit referred only to part of the land comprised in the holding. Danckwerts J. held that the notice was invalid, on the ground that at common law a notice to quit part of land comprised in a tenancy is bad. This is intelligible enough, and, with respect, perfectly correct. There are special provisions in the 1948 Act, under which a notice to quit part of a holding is valid in certain circumstances, but the present case did not fall within these provisions. The second ground given by Danckwerts J., which is based on section 24 (2) (g) of the 1948 Act, is more interesting. Section 24 (2) (g) enables a notice to quit to be given, which is immune from the counter-notice machinery of section 24 (1) and does not attract compensation for disturbance, within three months of the death of the tenant with whom the contract of tenancy is made. The question, what happens on the death of the survivor of two joint tenants has often been discussed, and Danckwerts J.'s remarks on this point are of interest.

It may be noted here that the report of the case in the *Weekly Law Reports* must be wrong, because it gives the date of the survivor's death as September 17, 1952, and the date of the notice to quit as February 5, 1953. If this had been correct no question in regard to section 24 (2) (g) could ever have arisen, since the interval between the death and the notice would have been much more than three months. The date of death given in the *All England Law Reports*, December 17, is probably the right one. Danckwerts J's view,

whether *obiter* or not, is that section 24 (2) (g) can apply only if both tenants die within three months of the giving of notice to quit. It can apply only, therefore, in the somewhat unlikely event of both joint tenants dying in rapid succession, when the notice to quit must be served within three months of the death of the first to die.

(Jackson's *Agricultural Holdings,* 10th ed., p. 138.)

Sclater v. *Horton* [1954] 2 W.L.R. 566.

Agricultural holdings—rental arbitration—section 8 *of* 1948 *Act —time for proceeding with reference—reference must ante-date term day from which variation in rent will take effect.*—This is an important decision on a troublesome point which has caused agricultural arbitrators some difficulty. The decision is of considerable interest to agricultural valuers and arbitrators, and, indeed, to all concerned with the law of agricultural holdings. The facts were (the dates are material) that the landlord on September 26, 1949, served a notice under section 8 of the Agricultural Holdings Act, 1948, demanding a reference to arbitration of the question: What rent should be payable as from the next ensuing day on which the tenancy could have been determined by notice to quit, given at the date of the demand? The "next ensuing day" was September 29, 1950. No steps were taken to proceed with this demand, and on September 26, 1952, a further similar demand was made, "the next ensuing day" in this case being September 29, 1953. On the landlord's application the Minister of Agriculture and Fisheries appointed an arbitrator on October 24, 1952. At the hearing before the arbitrator, the landlord claimed that the arbitrator could make an award which would affect the rent payable from September 29, 1950, whereas the tenant claimed that the award could affect only the rent payable from September 29, 1953.

The case is, unfortunately, somewhat befogged by the fact that two demands for arbitration were made by the landlord, the first in 1949 and the second in 1952. Owing to the manner in which the case was presented, there is no clear-cut *decision* on the question whether the first demand remained valid and subsisting so that action could properly be taken under it years later, even if such action could not have retrospective results. The only question decided was whether, assuming the 1949 demand remained effective, the arbitrator's award could deal with the rent from September 29, 1950, or only from September 29, 1953. The Court of Appeal, affirming the county court judge, held that the arbitrator could deal only with the rent from the later date. They read into section 8, the implication that the "next ensuing day," *i.e.,* the term day from which the variation of rent takes effect, must be after the date of the reference. The date of the reference is the date when the appointment of the arbitrator becomes effective—in the present case October 24, 1952. The court were much influenced by the fact that the opposite decision would have meant that a rent operative from September 29, 1950, would have been fixed by reference to circumstances as they were

in October, 1952, and that the Act contained no machinery for dealing with past under-payments (or over-payments) of rent. They also pointed to the tenses used in section 8 which evidently contemplated that the variation of rent should become operative at a date later than the reference.

It is, therefore, now clear that an award under section 8 can only affect rent payable from the term day after the date of the reference, and that the date of the reference is the date of the effective appointment of the arbitrator. It is not entirely clear whether, if a demand is made, proceedings must be taken within the year ending on the term day contemplated in the demand as that from which the variation of rent should take effect, or whether it is permissible to delay action on the demand provided only that when the reference eventually takes place any variation will operate from the next following term day only. Denning L.J.'s judgment, and also that of Romer L.J., point to the former conclusion, and it would be advisable for those concerned with arbitrations of this kind to act upon this view. This means that the arbitrator should be appointed and accept appointment within the year before the term day from which his award will take effect. It will be remembered that under paragraph 13 of the Sixth Schedule to the 1948 Act the arbitrator must make and sign his award within forty-two days of his appointment, unless the Minister extends the time. It is desirable that the award should be made a reasonable time before the term day from which the variation of rent will operate.

(Jackson's *Agricultural Holdings,* 10th ed., p. 116.)

Nightingale v. *Courtney* [1954] 2 W.L.R. 266; [1954] 1 All E.R. 362

Contract by tenant to purchase reversion—statutory tenant—whether tenancy surrendered by implication of law—intention of the parties.—There is no presumption that when a tenant enters into a contract with his landlord to purchase the reversion the tenancy is *ipso facto* surrendered by operation of law and that the tenant then occupies as a licensee pending completion. The question of surrender or no surrender is a question of the intention of the parties. This is in accordance with the rule as stated in *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695, that the tenant's agreement to purchase the reversion, being impliedly conditional on a good title being made, did not operate as a surrender. *Turner* v. *Watts* (1927) 44 T.L.R. 105 and 337 was decided on the ground that the terms of the contract negatived the continued payment of rent and provided for the payment of interest on the purchase price from the date of the agreement, and for the purchaser to undertake repairs and insurance: see *per* Somervell L.J. in *Leek and Moorlands Building Society* v. *Clark* [1952] 2 Q.B. 788, 791. In the present case the intention revealed by the contract was different. The contract provided that the property was sold subject to the purchaser's existing tenancy of part of it. The fact that the purchaser was not a contractual but only a statutory tenant did not affect the matter.

There was nothing in the agreement to indicate that the right of occupation which was to continue was referable to something other than the Statute.

(Woodfall, 25th ed., p. 970; Megarry, 7th ed., p. 219.)

Re Good's Lease [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275

Forfeiture—relief—right of underlessee to claim relief—position of person entitled to call for a legal charge or mortgage of the lease. —In this case Harman J. held that a person who was entitled only to call for a legal charge or mortgage of a lessee's interest could apply, as an "underlessee," for relief against forfeiture under section 146 (4) of the Law of Property Act, 1925. The assignee of a lease had undertaken when called on by the guarantor of his bank account to execute, in favour of the guarantor, a legal charge or mortgage. The guarantee came into operation and the guarantor paid some money under it. The assignee of the lease became bankrupt and the landlord sought possession on the grounds of breach of covenant and non-payment of rent. The guarantor applied for relief under section 146 (4). Harman J. made an order vesting the premises in him for the residue of the term of the lease, on condition that he paid the arrears of rent and executed a new instrument making himself directly responsible to the landlord for the covenants of the lease. Harman J. held that the guarantor was a person whose position could be regarded as covered by the definition of an underlease in section 146 (5), where it includes "an agreement for an underlease where the underlessee is entitled to have his underlease granted."

(Woodfall, 25th ed., pp. 1005 *et seq.*)

R. v. *Brighton and Area Rent Tribunal, ex p. Slaughter* [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423

Landlord and Tenant (Rent Control) Act, 1949*—meaning of "dwelling-house"—shop with self-contained flat above—covenant not to use except as a shop—construction of covenant—jurisdiction of tribunal.*—Premises consisting of a shop on the ground floor and a self-contained residential flat above were let subject to a covenant that the premises would not be used except as a shop and not otherwise than for the business of a greengrocer. The Divisional Court construed the covenant as not intended to prevent the use of the flat as a dwelling-house. The court accordingly granted an application for mandamus to the rent tribunal to hear an application by the tenant under the Landlord and Tenant (Rent Control) Act, 1949. The principle stated by the court is that "be the premises what they may, if it appears that they were let to a tenant for the purpose of his living in them as his house, provided he is not a service tenant, then they come within the Acts, subject of course, to their rental or rateable value." The decision turns on the interpretation given

by the court to the covenant. As so interpreted it did not provide that the whole of the premises had to be used for business purposes only. The decision is not, therefore, in conflict with the rule approved in *Wolfe* v. *Hogan* [1949] 2 K.B. 194, 203, that if premises are let for business purposes the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises.

(Megarry, 7th ed., p. 59; Rent Restrictions Guide, 3rd ed., p. 23.)

R. v. *Folkestone Rent Tribunal, ex p. Webb* [1954] 1 All E.R. 427

Landlord and Tenant (Rent Control) Act, 1949—*shop and dwelling-house—covenant not to carry on any business other than that of tobacconist—tribunal's jurisdiction.*—This case is referred to by Lord Goddard C.J. in *Slaughter's* case above, as unreported, but it is noted at [1954] 1 All E.R. 427. In *Webb's* case the premises consisted of a shop on the ground floor and dwelling-house accommodation with a separate entrance above. There was a covenant not to carry on any business on the premises other than that of a tobacconist. *Webb's* case is easier than *Slaughter's* case, since a covenant not to carry on any business other than that of a tobacconist is clearly quite compatible with the residential use of part of the premises. A covenant not to use the premises except as a shop, on the other hand, does at least raise a doubt whether any residential use is permitted.

R. v. *York, etc., Rent Tribunal, ex p. Ingle* [1954] 2 W.L.R. 294; [1954] 1 All E.R. 440

Furnished Houses (Rent Control) Act, 1946—*boarding house—whether occupied as a residence—rent tribunal's jurisdiction.*—In this case, although a case under the 1946 Act and not the 1949 Act, the Divisional Court applied the same principle as in *Slaughter's* case above. The premises were described in the letting as a boarding house, but there was no covenant as to user. The tenant occupied part of the premises with her family as their home and ran the remainder as a boarding house. On an application by the tenant under the 1946 Act it was objected that the premises had been let as business premises and not as a residence. The tribunal upheld the objection, but the Divisional Court granted the tenant's application for mandamus. The court referred to *Slaughter's* case and held that, if anything, the principle there adopted could be applied more easily to a 1946 Act case, since that Act is expressly applied to contracts under which the lessee is within his rights in occupying the premises as a residence.

(Megarry, 7th ed., p. 423; Rent Restrictions Guide, 3rd ed., p. 117.)

Lockwood v. *Lowe* [1954] 2 W.L.R. 296; [1954] 1 All E.R. 472

Landlord and Tenant (Rent Control) Act, 1949—*shared accommodation—sharing between two tenants—effect of one tenant vacating premises—rights of other tenant not affected.*—In this case premises were let to two tenants on the terms that they should each have exclusive occupation of part, and should share the use of a scullery and bathroom. One of the tenants vacated his part of the premises, and the landlord thereupon claimed possession of the whole house. The court treated the scullery as equivalent to the kitchen, and therefore "living accommodation" within the meaning of the authorities on sharing. The Court of Appeal were unanimous in holding that the landlord's action failed, but they were not quite unanimous in their reasons. It was agreed that so long as both tenants occupied the premises section 8 (1) of the 1949 Act applied. Denning and Morris L.JJ. took the view that the fact that one of the tenants had vacated his part of the premises did not affect the "terms" on which the other tenant held his separate accommodation. Denning L.J. expressed the view that the court under section 8 (8) might have power to modify the contract so as to enable the landlord to put someone else in the house in the place of the tenant who had left, with similar sharing rights, or, possibly, so as to permit the landlord himself to share; the court would, however, hesitate to take the latter course, as it would mean that the tenant would be left with the reduced protection of section 7. Romer L.J. felt difficulty in holding that section 8 (1) applied after one of the tenants had left, and was driven to the conclusion that the remaining tenant's right to use the scullery and bathroom became an exclusive right. Denning L.J. found difficulty in understanding the proviso to section 8 (8), which supports the criticisms which the present commentator has made about the drafting of this proviso.

(Megarry, 7th ed., p. 72, p. 75.)

Isaacs v. *Titus* [1954] 1 W.L.R. 398; [1954] 1 All E.R. 470

Landlord and Tenant (Rent Control) Act, 1949—*shared accommodation—sharing between two tenants—effect of one tenant vacating possession—rights of other tenant not affected.*—The facts in this case were in all material respects the same as in *Lockwood* v. *Lowe* above, and the latter decision was followed. Sir Raymond Evershed M.R. in the present case refers to the difference of approach between Denning and Morris L.JJ. on the one hand, and Romer L.J. on the other, in *Lockwood* v. *Lowe,* but gives no indication in regard to the view which he himself favoured.

Gluchowska v. *Tottenham Borough Council* [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408

Furnished Houses (Rent Control) Act, 1946—*rent fixed and registered—subsequent letting of part of premises at a higher rent*

than that registered for the whole premises—no offence committed.—The rent of certain premises was fixed and duly registered under the Furnished Houses (Rent Control) Act, 1946. Subsequently the landlord let a part of these premises at a rent above the registered rent for the whole. The majority of the Divisional Court (Parke J. and Byrne J.) held that no offence had been committed. The premises let at the higher rent were a different unit from the premises in respect of which the rent had been registered. It was not permissible to construe "those premises" in section 4 of the 1946 Act as equivalent to "those premises or any part thereof." Lord Goddard C.J. disagreed. He took the view that both in logic and in law the greater includes the less. The effect of the majority's decision is mitigated by the fact that the tenant of the part can refer his contract to the tribunal and ask it to fix and cause to be registered a rent for that part. There is something to be said for both constructions, and it is unfortunate that there is no method by which the difference between the Lord Chief Justice and his brethren can be considered on appeal.

(Megarry, 7th ed., 439; Rent Restrictions Guide, 3rd ed., 121.)

Henry v. *Taylor* [1954] 2 W.L.R. 601

Furnished Houses (Rent Control) Act, 1946—registered rent—payment of sum in excess of registered amount—amount recoverable—excess not whole payment.—In this case the landlord had required and received payment of an amount which was in excess of the rent registered under the Furnished Houses (Rent Control) Act, 1946. The short question was whether the amount recoverable by the tenant was the whole payment or merely the excess. The answer turned on the true interpretation of section 4 (2) of the 1946 Act, which provides that, where any payment has been made in contravention of section 4 (1) (which provides that it shall be unlawful to require or receive on account of rent payment of any sum in excess of the rent entered on the register) "the amount thereof" shall be recoverable. The Court of Appeal, reversing Croom-Johnson J., held that the payment which was in contravention of section 4 (1) was the payment in excess of the registered amount, not the whole payment, and consequently that only the excess was recoverable. Thus if the registered rent is 20s. and 25s. is received, the amount recoverable is the 5s., not the whole 25s.

(Megarry, 7th ed., 439; Rent Restrictions Guide, 3rd ed., 121.)

Eales v. *Dale* [1954] 2 W.L.R. 593

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—price of furniture—premium—reasonable and market prices.—The question in this case was whether the price charged for certain articles of furniture as the condition of the grant of a tenancy was

a reasonable price or whether it contained any element of premium within the meaning of section 3 (1) of the Landlord and Tenant (Rent Control) Act, 1949. The case is of interest as containing some general observations by the Court of Appeal on what is meant by a " reasonable price." Reasonable price is not synonymous with market value, although the latter is an important indication of the reasonable price. Reasonable price is the price which is reasonable between the parties for the articles as they are, fitted and situate in the premises, without regard to extraneous circumstances, such as the desire of the tenant to obtain a tenancy. It is not the price which would be realised if the articles were removed and sold in an auction room. It is the price which would reasonably be expected to be agreed between an incoming tenant who was ready to take the articles over, and an outgoing tenant who was ready to leave them there.

(Megarry, 7th ed., 382; Rent Restrictions Guide, 3rd ed., 76.)

Re Town Investments, Ltd. Underlease [1954] 2 W.L.R. 355; [1954] 1 All E.R. 585

Underletting—whether consent unreasonably withheld—proposed underletting at low rent and substantial premium—effect on security for distress and on depreciation of value—not unreasonably withheld. —In this case Danckwerts J. held that landlords had not unreasonably refused their consent to a proposed underletting where the rent proposed was well below the current market rent, and below the rent payable under the lease, but was coupled with a proposal to pay a substantial premium to the underlessor. The proposed arrangement might injure the landlords in two ways. First, it might endanger the recovery by them from the undertenants under section 6 of the Law of Distress Amendment Act, 1908, of the full amount of any arrears of rent owing by the tenant. Secondly, the low rent might depreciate the value of the premises on any future sale or other transaction. Danckwerts J.'s decision goes somewhat farther than the rule laid down in *Holder Bros. & Co.* v. *Gibbs* [1924] Ch. 575, but there have been signs that the latter was too narrowly stated: see *Viscount Tredegar* v. *Harwood* [1929] A.C. 72, and the more recent cases cited in Woodfall (25th ed.), pp. 629, 630.

(Woodfall, 25th ed., *supra.*)

Springett v. *Harold* [1954] 1 W.L.R. 521

Public Health (London) Act, 1936*—alleged failure to abate a nuisance—dwelling-house in need of decorative repair—not a nuisance.* —The Divisional Court in this case summarily rejected the contention that the lack of decorative repair of a dwelling-house constituted a nuisance within section 82 of the Public Health (London) Act, 1936. The facts were that certain walls and a ceiling were stained and dirty and flaking, but not damp or verminous or injurious to health,

and the premises were fit for human habitation. The opposite decision would have caused a good deal of alarm and despondency among owners of property. Some individual local authorities have sought to embody in their Private Bills clauses which produce the result contended for in this case, and these efforts have met with some success. It would, however, be impracticable to enforce generally a high standard of decorative repair while the landlord's income remains stabilised at its present level. It may be noticed, as a matter of interest, that "good repair" under the new Housing Repairs and Rents Bill includes decorative repair, but this is required only as a condition of obtaining the proposed increase of rent and not as part of the duty of maintaining the dwelling in a condition reasonably fit for human habitation.

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7. *REVENUE CASES*

By Desmond C. Miller, Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Income Tax

Pearlberg v. *Commissioners of Inland Revenue* [1953] 1 W.L.R. 331; [1953] 1 All E.R. 388 (C.A.).

Statutory provisions: Section 169 of the Income Tax Act, 1918; section 12 (1) and paragraph 5 of the First Schedule to the Finance Act, 1941.

Point: Where no notice of appeal is given against assessment to income tax made under Schedule A, or against notice served pursuant to paragraph 5 of the First Schedule to the Finance Act, 1941, the taxpayer cannot raise issues of fact going to the merits of the Crown's claim for tax, by way of defence to a specially endorsed writ for tax due and assessed, issued in the High Court.

The proper forum and indeed the only forum for issues of fact and law arising upon assessments to tax is that constituted by the General or the Special Commissioners as the case may be.

Thomas v. *Marshall* [1953] 2 W.L.R. 944; [1953] 1 All E.R. 1102 (H.L.).

The judgment of the Court of Appeal (noted in Vol. 16, No. 6, at p. 476) was unanimously affirmed by the House of Lords.

The judgment of Lord Morton of Henryton, who in fact delivered the judgment of the House, founded largely upon the provisions of subsection (9) of section 21 of the Finance Act, 1936 (now section 403

of the Income Tax Act, 1952) defining "settlement." His Lordship added, "I can find no words in section 21 of the Finance Act, 1936, which would lead your Lordships to put a limited meaning upon the words 'transfer of assets' and, if and so far as one can gather the intendment of section 21 from its wording, I think it was intended to throw the net as widely as possible, and to sweep in all kinds of transactions which would not ordinarily be regarded as settlements, provided only that by virtue or in consequence thereof any income is paid to or for the benefit of a child of the settlor."

Bray v. *Colenbrander* [1953] 2 W.L.R. 927; [1953] 1 All E.R. 1090 (H.L.).

The judgment of the Court of Appeal (noted in Vol. 16, No. 6, at p. 481) was unanimously affirmed by the House of Lords.

C. I. R. v. *City of London Corporation (as Conservators of Epping Forest)* [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075 (H.L.).

The judgment of the Court of Appeal (noted in Vol. 16, No. 6, at p. 478) was unanimously affirmed.

Howe (Earl) v. *C. I. R.* [1919] 2 K.B. 336, and *Re Hanbury* (1939) 20 A.T.C. 333, approved.

Estate Duty

Oakes v. *New South Wales Commissioner of Stamp Duties* [1953] 3 W.L.R. 1127; [1953] T.R. 453

Statutory provisions: Section 102 (2) (d), The New South Wales Stamp Duties Acts, 1920–1940.

Point: The right to remuneration as trustee is not a beneficial interest in the property settled; it is the reservation of a power to benefit at the expense of the persons interested under the terms of trust in that property. Hence, where the settlor appoints himself as trustee, he has not, for Estate Duty purposes, entirely excluded himself from benefit.

(The charging provisions of the New South Wales Stamp Duties Acts are in all material respects similar to those applied in the United Kingdom by section 2 (1) (c), the Finance Act, 1894.)

Facts and Decision: In 1924, the deceased, as settlor, by Deed of Trust, declared that he held the property therein described upon trust for himself and his four children, as tenants in common in equal shares. Thereafter, the Deed conferred a number of powers and discretions on the trustee, including the power to appropriate and partition trust property, to reimburse himself (or other the trustee), all expenses incurred in the administration of the Trust. In addition power was reserved to the trustee to charge and be paid for

work done in managing and controlling trust property, as if he were not trustee.

The Settlor acted as trustee until his death in 1947 and, for the greater part of the period from the date of settlement, received substantial remuneration for his duties of management. After deducting these and other expenses, the net profits arising from the trust property were divided into five equal shares, which were credited, one share to the deceased and one share to each of his children. It was found as a fact that the amounts credited to each child were paid or applied by the Settlor for the maintenance and education of the child, or were paid to such child for his or her own use on and after attainment of majority.

The value of the trust property at the date of the deceased's death was £71,900, and the Commissioner of Stamp Duties assessed duty on the basis that the whole was, or was to be deemed to be, included in the deceased's estate. The Executors maintained that one-fifth in value only (of the trust property) should have been included in that estate.

Held: (i) In the absence of evidence of any benefit to the deceased, the application of trust income for the children's education and maintenance did not bring the case within the charging provisions of section 102 (2) (d) *supra*.

(ii) The right to take and the taking of, remuneration was a benefit to the deceased and, moreover, was not a benefit reserved, but one secured by contract or otherwise.

As a consequence the Crown's claim to duty succeeded. (The questions raised by the other powers reserved to the deceased, *e.g.*, to appropriate and partition the trust property, were left at large.)

Sneddon & Others v. *Lord Avocate* [1954] 2 W.L.R. 211; [1954] T.R. 15 (H.L.)

Statutory provisions: Section 2 (1) (c), The Finance Act, 1894.

Point: The charge under section 2 (1) (c), *supra*, is a charge upon certain defined property, *i.e.*, that taken under the relevant disposition; it is not a charge upon beneficial interests in property. In order to determine the property taken, it is therefore necessary to look at the moment when the gift was made. *Re Payne, Poplett* v. *Att.-Gen.* [1940] 2 All E.R. 115, overruled.

Facts and Decision: On December 19, 1946, the deceased, William Hetherington, executed a Deed of Trust, declaring that the trust fund consisted of the sum of £5,000 sterling which, (or investments representing the same), was to be held upon trust for his daughter Elizabeth for life, with remainders over. The deed conferred wide powers of investment upon the trustees, including the express power to take up shares in a company, Creamola (England) Ltd. On December 24, the deceased, by cheque drawn in favour of the trustees' solicitors, paid to them the sum of £5,000 to be held on the declared trusts and, on the same date, the solicitors, on behalf of the

trustees, subscribed for 5,000 £1 ordinary shares in Creamola (England) Ltd. The shares were allotted to and retained by the trustees until the date of the deceased's death, which occurred on February 5, 1948.

It was common ground that the value of the Creamola shares, at the date of death, was £9,250, and the sole question before the court was whether the property, which was deemed to pass at Mr. Hetherington's death, was £5,000 or the trust fund in its state of investment at the date of his death, *i.e.*, the Creamola shares. The Crown maintained that the subject-matter of charge, *i.e.*, the property taken under the disposition, was the trust fund; a species of property in itself distinct from, but yet embracing such properties as might from time to time be subject to the trust, but did not, for this purpose, rely upon any extended meaning given to the term "property" by section 22, the Finance Act, 1894. It was necessary for this purpose, and the Crown of course submitted, that the case of *Re Payne, supra,* was rightly decided.

Held: (Lord Keith of Avonholm dissenting). The Finance Act, 1894 (by section 1), charges property which passes on death, not the rights or obligations attached to that property. As a consequence, the property deemed to pass at the death of William Hetherington was £5,000.

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8. *MISCELLANEOUS*

Style v. *Style and Keiller* [1954] 2 W.L.R. 306; [1954] 1 All E.R. 442

Husband and wife—settlement of wife's property on divorce—points of practice.—On an appeal from the decision of Barnard J. (noted in Vol. 17, p. 433), the Court of Appeal varied his order, holding that the court has jurisdiction under section 24 of the Matrimonial Causes Act, 1950, to order a settlement by a wife on the husband which has the effect of securing income as from such date as the court thinks reasonable, and can make provision retrospectively for any period between the date of the decree absolute and the execution of the settlement. In the instant case the order was made to apply from the date on which notice of application was given to the wife's solicitors. The Court of Appeal affirmed Barnard J.'s decision that the court has no power to refer the deed of settlement to conveyancing counsel without the consent of the parties.

Wright v. *Wright* [1954] 1 W.L.R. 534; [1954] 1 All E.R. 707

Husband and wife—maintenance—application for injunction to restrain the husband from dealing with his property.—It is well settled that, where a wife has an order in her favour for alimony or maintenance and the husband is in arrear, an injunction will be granted to

restrain the husband from dealing with his property so as to defeat the order, but the court has no jurisdiction to grant an injunction in respect of instalments to become due at a future date: *Fanshawe* v. *Fanshawe* [1927] P. 238; nor can the court grant an injunction before the wife has obtained an order for alimony or maintenance: *Jagger* v. *Jagger* [1926] P. 93; *Scott* v. *Scott* [1951] P. 193. In the instant case the wife had obtained an order for maintenance and the husband was not in arrear in his payments under that order. The wife had filed an application to vary the order and while this application was pending she applied to the court for an injunction to restrain the husband from dealing with certain of his property, as he had clearly threatened to do, pending the determination of her application. Collingwood J. held that the court had no jurisdiction to grant an injunction, its power being restricted to the enforcement of an existing order.

Dean v. *Prince* [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749

Valuation of shares under company's articles—going behind the valuation—method of valuation.—This was an appeal from the decision of Harman J. (noted in Vol. 17, p. 320). It will be remembered that the articles of association of a private company provided that, on the death of a director, the surviving directors should purchase his shares at a price to be certified by an auditor, acting as an expert, as a fair value. The shares in question constituted a controlling interest but, nevertheless, they were valued by the auditor on a break-up basis. As the auditor had been persuaded to disclose his method of valuation, Harman J. held that the court could go behind the auditor's certificate. Although there was no appeal against this part of the decision, it seems clear that the Court of Appeal would have agreed with Harman J. Denning L.J. said ([1954] 2 W.L.R 551): " [The valuation] can be impeached not only for fraud but also for mistake or miscarriage. That was made clear by Sir John Romilly M.R. in *Collier* v. *Mason* (1858) 25 Beav. 200, 204. For instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: or interpreted the agreement wrongly, or proceeded on some erroneous principle. In all these cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere. . . ." On the substantive question whether the auditor had applied the wrong principles the Court of Appeal took a different view from Harman J. on the weight to be attached to certain matters affecting the valuation and reversed his decision. In the result, the actual decision turned on the special facts and the judgments can hardly be said to lay down any general principles.

Stockloser v. *Johnson* [1954] 2 W.L.R. 439; [1949] 1 All E.R. 630

Vendor and purchaser—purchase by instalments—rescission by vendor—forfeiture of instalments.—This is an important case. A vendor sold certain machinery to a purchaser, the price being payable by instalments. The purchaser took delivery of the machinery and put it to profitable use. The contract provided that on default in payment of any instalment for twenty-eight days the vendor was to be entitled to rescind the contract, forfeit the instalments already paid and retake possession of the machinery. The purchaser having defaulted, the vendor exercised his rights. The purchaser then claimed the return of the paid instalments, contending that the retention of the instalments amounted to the exaction of a penalty from which he was entitled to be relieved. All three members of the Court of Appeal were agreed that the forfeiture was not a penalty, for the vendor was only claiming to retain money paid to him under the contract and not as a result of a breach of contract, that in the particular circumstances there was nothing unconscionable in the vendor's retention of all the instalments and the purchaser had not made out a case for relief; but there was a sharp division of opinion whether a purchaser could ever get relief from forfeiture of instalments paid and duly forfeited under a contract.

Certain points seem to be clearly established: (1) There is no difference between contracts for the sale of land and contracts for the sale of other property. (2) A vendor is always entitled to forfeit a deposit on breach by the purchaser: *Howe* v. *Smith* (1884) 27 Ch.D. 89. (3) Where instalments of the purchase price, other than a deposit, are paid under a contract and the vendor rescinds, the purchaser can, in the absence of contrary stipulation, recover the instalments: *Mayson* v. *Clouet* [1924] A.C. 980; *Mussen* v. *Van Dieman's Land Co.* [1938] Ch. 253. Romer L.J., approving the decision in *Mussen* v. *Van Dieman's Land Co.*, took the view that, while the contract is subsisting and assuming, apparently, that time is not of the essence, equity can give relief by extending the time for payment, but that after rescission no relief can be given in the absence of some special circumstance, such as fraud, sharp practice or other unconscionable conduct of the vendor.

Somervell and Denning L.JJ. took the view that there is a much wider (and, apparently, more vague) jurisdiction and that a purchaser is entitled to relief if he can shew that retention of the instalments would in all the circumstances be unconscionable. Indeed, Denning L.J. was of the opinion that the jurisdiction extends even to relief against forfeiture of the deposit. In view of the agreement of the court that the purchaser had made out no case for relief, it was not necessary to consider the exact nature of the relief which would be given in an appropriate case. Is the purchaser to get back his instalments and the vendor to get damages for the exact loss he proves? Denning L.J. said that equity would relieve "on such terms as may be just," which leaves the answer, as indeed the whole matter, rather in the air.

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer

Dear Sir,

Tax-free Annuities

As the draftsman of the Deed of Covenant, at p. 342 of Vol. 12 of *The Conveyancer,* I should like an opportunity to give my own views on the points raised by D. R. S. in *The Conveyancer's Notebook,* at p. 2, *ante.* The precedent was of course drafted prior to the decision in *I. R. C.* v. *Duncanson* [1949] 2 All E.R. 846. I submit, however, that the annuitant is under the precedent entitled to freedom from surtax on the proportion of reliefs repayable to the covenantor.

The words "at the standard rate" in the covenant would, apart from the context, no doubt imply that the whole of the reliefs become the annuitant's property. Clause 3 (3), however, which provides that the covenant to repay is in substitution for any implied obligation to repay, shows that the covenant is in reality a *Re Pettit* covenant with an express instead of an implied provision for repayment; otherwise there could have been no implied obligation. The covenant is merely machinery, rendered necessary by the annuitant's right to claim the reliefs in the first instance. The object of the reference to the standard rate is, of course, to prevent the annuity being free from surtax. In any case the question would only be important when the annuity is of a large amount, and the importance to the covenantor (on whose behalf the covenant is drafted) of clarifying the exact obligation to repay is obvious. As regards the second point raised, I am unable to understand how it can be argued that what is to be repaid is not what the covenant says in plain terms, *viz.,* a portion of the reliefs, not a sum equal to the proportion.

The provision for repayment is even fortified by a covenant to claim the reliefs. I submit, therefore, that the precedent is still applicable, though possibly the reliefs should in view of later decisions now be specified somewhat differently.

Yours Faithfully,

E. H. Bodkin.

Lincoln's Inn, March 15, 1954.

THE LIBRARY

Key & Elphinstone's Precedents in Conveyancing. Fifteenth Edition. Vols. 1 and 2. Edited by R. R. A. Walker, R. G. Metcalfe, E. H. Bodkin, L. R. Norris, T. A. Blanco White, E. J. T. G. Bagshawe and V. G. H. Hallett, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1953. Vol. 1, clxxii and 1467 pp. Vol. 2, cliv and 1241 pp. (3 Vols. £15 15s. net.)

In this new edition, except for an improvement in the table of statutes, there has been little change in the arrangement and setting of the subject-matter. The law is stated as at July 1, 1953, and, as in the last edition, Vol. 1 covers Agreements to Licences and Water Rights and Vol. 2 Mortgages to Wills. Vol. 3 will deal, as before, with registered land. The volumes have increased very little in size, for, although a considerable amount of new matter has been added, much which had become obsolescent and unnecessary has been omitted.

The sections on Conveyances, Mortgages, Settlements and Wills had been thoroughly revised by the late Mr. F. E. Farrer before his death. His work, and in particular the preliminary notes drafted by him in the section on Conveyances (see, *e.g.*, Vol. 1, pp. 595, 605, 790 and 810), is certainly an invaluable contribution to the new edition. There are a considerable number of useful new precedents throughout the two volumes. In particular, in the section on Patents, which has been entirely reshaped by Mr. Blanco White, there has been included an agreement for the sale of technical information of "Know-How" (Vol. 2, p. 519). In the section on Separation Deeds is included a covenant for the maintenance of a wife living apart from her husband so as to preserve desertion as a ground for divorce (Vol. 2, p. 583). In the section on Partnership there are articles of partnership between doctors who are entitled to compensation for inability to sell goodwill under the National Health Service Act, 1946 (Vol. 2, p. 444). In Vol. 2, at p. 563, there is a release by the widow of an intestate of her statutory life interest, and in Vol. 1, at p. 888, there is a new precedent of surrender by a tenant for life to the remainderman where the settlement is thereby brought to an end.

The new edition is thoroughly up to date as regards town and country planning, including the Act of 1953. The editor submits (Vol. 1, at p. 617), that the permitted user of the land is not a question of title, but nevertheless, in case this is wrong, provisos limiting the vendor's covenants for title in respect of planning contraventions are included (Vol. 1, at p. 620). There are precedents of a contract for sale and conveyances of war-damaged property (Vol. 1, pp. 520, 868 and 870), but the editors have purposely stopped short of other "temporary" legislation. There is an agreement for a service tenancy of rent restricted property (Vol. 1, p. 1071), but otherwise no attempt has been made to cover the loopholes in the Rent Acts. There is no precedent for the conveyance of freehold flats, which form of property owning, however unsatisfactory, is now becoming so common. Covenants and settlements to avoid tax have also been covered but lightly, and this seems reasonable as this subject is now so highly specialised and the law is so often altered. There is a simple seven-year covenant (Vol. 1, p. 306), and a voluntary settlement by a grandparent on his living grandchildren (Vol. 2, p. 757).

Every draftsman has a favourite precedent book and *Key & Elphinstone* has had the highest reputation throughout its long history. Older practitioners know well what an invaluable book it is. It seems a pity, therefore, that more attention has not been paid to improving the physical appearance of the new edition. Vols. 1 and 2 are much too large for easy handling and would have been better divided into three. Although this might well have increased the cost (already more than double that of the last edition), it would have saved what would seem to be inevitable repairs in the future when the back of a well-used copy will break. The setting and lay-out of the subject-matter is also not as good as it might be, and the paragraphs of the precedents are too close together. The most irritating feature is the length of the footnotes which threaten particularly in the section on Leases to swamp the text entirely. It is a very great pity that the editors did not follow the late Mr. Farrer's example and draft preliminary notes to reduce the footnotes as much as possible. Unfortunately as a result of these failings the younger and less experienced draftsman is likely to leave this edition on the shelf when he has the choice of a volume which is both lighter and easier to copy.

This edition, as compared with the last, is the work of many hands, and this has almost inevitably resulted in some unevenness, for the sections are not all up to the same standard. It is, of course, quite impossible to make a monumental work of this kind quite perfect, and it is always easy for a reviewer to find some error. It is, nevertheless, very surprising that no reference has been made in the section on Licences (Vol. 1, at p. 1251), to *Errington* v. *Errington* [1952] 1 K.B. 290 and the cases which have followed it. Indeed, in view of the developments made in these cases there might have been some ground for including a new precedent, for example, a licence to a retired servant to live in a cottage free of outgoings. In the section on Leases also there is no more than a passing reference to *Foster* v. *Robinson* [1951] 1 K.B. 149, and no note as to the implications of that case with regard to surrenders of leases by operation of law. The interesting problems arising from these cases are set out in two articles by Mr. Desmond Pollock in *The Conveyancer,* Vol. 16, at pp. 202 and 436.

Re Duke of Northumberland [1951] Ch. 202 and *Re Sutherland Settlement Trusts* [1953] Ch. 792, concerning the interpretation of section 96 (1) of the Agricultural Holdings Act, 1948, as regards improvements by a tenant for life of settled land, are mentioned in the section on Leases, but there is no reference at all to those cases in the section on Settlements where surely they are even more important. Finally, there is no reference anywhere to *Michael Borys* v. *Canadian Pacific Railway Co.* [1953] 2 W.L.R. 225, a decision of the Judicial Committee in which Lord Porter said that a grant of mineral rights implies a right to work them, provided that no subsidence is caused thereby.

Key & Elphinstone may, perhaps, be described as the conservative precedent book, and this edition lives up to the reputation of those of the past for considered and careful draftsmanship. It will be given a good welcome by those who have relied upon it in the past.

S. M. T.

The Law of Trusts. Sixth Edition. Professor G. W. Keeton, LL.D. Pitman. 1954. lxviii and 499 pp. (45s.)

The new edition of this very widely used student's textbook is much the same size as its predecessor and is exactly the same in appearance. The principal additions are in the chapter on Charitable Trusts, and there is also added a new chapter on "Trusts in the Conflict of Laws," which was published in *Current Legal Problems,* 1952.

This book has been well known for its clarity and accuracy and it

therefore seems a great pity that no attempt has apparently been made to eliminate the defects which were pointed out by reviewers of the last edition. The drastic rewriting and reshaping which was called for to bring the text into line with recent developments in the law has not been undertaken, and, as before, new matter has been confined largely to footnotes and very short additions to the text. Even the section on the Statutes of Limitation, the one which has been most criticised, still remains in its original form. That section shows most clearly how the mere addition of new material to the old text throws the whole subject-matter out of perspective, making the law appear unnecessarily involved and confused.

In addition to there being no textual revision, errors of detail have not been corrected; for example, the comment at p. 320 on *Re Gee* [1948] Ch. 284, which is misleading, remains unaltered, on p. 171 there is still a reference to the Board of Education, and on p. 192 a reference to section 14 of the Poor Law Act, 1930, which was repealed by the Public Assistance Act, 1948. As in previous editions, in referring to recent cases, often the only reference given in the footnote is to the *Weekly Notes* (see, *e.g., Re Kellner's Will Trusts,* at p. 168, and *Buttle* v. *Saunders,* at p. 270), though the full references are given in the index. Again the law is stated as it existed over a year previous to publication and nothing after the end of 1952 is covered. Students will, therefore, have to bear in mind such cases as *Re Gestetner's Settlement* [1953] 2 W.L.R. 1033, *Re Robb* [1953] 2 W.L.R. 819, and the decision of the Court of Appeal in *Re Downshire's Settled Estates* [1953] 2 W.L.R. 94.

Of the new cases which have been included, the observations on *Re Power's Settlement Trusts* [1951] Ch. 1074 and *Re Shaw's Settlement* [1951] Ch. 833 seem somewhat ambiguous. Of the former, the author says at p. 234, "A person nominated to appoint new trustees may not appoint himself." A distinction should surely have been drawn between the appointment of an additional trustee under section 36 (6) of the Trustee Act, 1925, and an appointment to fill a vacancy under section 36 (1) of that Act. *Re Shaw's Settlement* (*supra*) is referred to at p. 314, but no attempt has been made to reconcile that case with the conflicting comment on *Re Stimpson's Trusts* [1931] 2 Ch. 77, or to discuss the differences which may occur when a protected life tenant consents to the exercise of a statutory power as opposed to an express power of advancement: see, *e.g., Re Rees* [1954] 2 W.L.R. 59.

It is, of course, obvious that all new cases should not be added to a new edition of a student's textbook, but it is suggested that a reference might well have been made in this edition to *Jackson* v. *Rodger* [1952] 1 All E.R. 16, with regard to incompletely constituted trusts and the rule in *Strong* v. *Bird* (1874) L.R. 18 Eq. 315, and also to *Re a Solicitor* [1952] 1 All E.R. 133, with regard to section 41 (1) of the Trustee Act, 1925, and the power of the court to appoint new trustees.

In short it must be said that this edition is a disappointment. It would, it seems, have been wiser to reprint the old edition so as to gain time to carry out the drastic revision to the text which is so necessary, for the longer this is postponed the more each edition diminishes in clarity, usefulness and value.

S. M. T.

The Finance of Landownership. By W. Walker-Watson. London: Frederick Warne & Co., Ltd. 245 pp. (21s.).

The law affecting landowners today is complex in the extreme and it is only too easy when considering one branch entirely to overlook another. Mr. Walker-Watson has taken as his subject finance as affecting landownership in its varied aspect and produced a coherent survey. True, he has not

written for lawyers but for landowners themselves; nevertheless the legal practitioner, especially if he has little experience of agricultural property, may find a number of signposts to help him on his way. One conclusion that emerges from the chapter on borrowing is that very often the landowner will save a great deal of money by registering his title voluntarily before approaching his bank. The book is most readable and should enable those called on to advise landowners to have a better understanding of their particular problems, without which the advice, however technically sound, may be at the best unsuitable and at the worst cause serious harm.

E. F. G.

The Taxation of Gifts and Settlements by Stamp Duty, Estate Duty, Income Tax and Surtax. By G. S. A. Wheatcroft, M.A. (Oxon.), a Master of the Supreme Court (Chancery Division). London: Sir Isaac Pitman & Sons, Ltd. xxviii and 159 and (index) 17 pp. (42s. net).

This short book is mainly directed to showing how tax can be avoided or reduced by careful draftsmanship. Solicitors, particularly, will find numerous hints on pitfalls to be avoided in drawing wills and settlements, and there are some excellent examples of ways to help clients to conserve their estates. The various suggestions are by no means only appropriate to very wealthy settlors and testators; some of them can, and should, be put into effect for clients of only moderate means.

This book will be found especially helpful by young solicitors, but all practitioners concerned with wills and settlements, even those with considerable experience, will find reminders of points which occasionally get overlooked. To obtain the most advantage the book should be read as a whole, and its size has deliberately been kept within a reasonably short compass. Necessarily this has involved the omission of the text of the relevant taxing statutes, which is undoubtedly a serious drawback, and makes the book unsatisfactory as a work of reference.

As Master Wheatcroft rightly points out, the existence of problems must be appreciated before they can be solved, and a real merit of this book is that it does give warning of cases where a successful saving of one form of taxation may involve an unexpected liability in another direction. Equally useful are the very practical methods suggested of saving estate duty or income tax by quite simple devices. In some cases a testator's or settlor's wishes can be equally well achieved in two different ways, but it is not always readily apparent that one form of drafting may result in considerably heavier taxation than another.

J. H. G.